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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JERRY GILMORE,

Petitioner,

v.

DENNIS EMERSON,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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91 pp

CAPITAL CASE

QUESTIONS PRESENTED

1. If the Court of Appeals correctly concluded in *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996), that amended §2254(d) applies to cases pending on the date of enactment and bars relief on constitutional claims decided by a state court, unless the petitioner can "point to an authoritative decision of the Supreme Court," to which the state court's decision is contrary or which the state court applied in an unreasonable fashion, then whether the Court of Appeals correctly refused to apply amended §2254(d), having found that the State waived the benefits of the provision by not specifically directing the court's attention to the new Act?

2. Whether the Court of Appeals incorrectly found that Emerson was denied the right to the effective assistance of counsel at the sentencing hearing where counsel's decision not to present mitigating evidence was based on Emerson's stated desire that no such evidence was to be presented?

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PETITION FOR WRIT OF CERTIORARI

The Petitioner Jerry Gilmore[1] respectfully asks this Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review that court's judgment and opinion entered on July 30, 1996.

OPINIONS BELOW

The April 30, 1987, decision of the Illinois Supreme Court, affirming Respondent-Emerson's conviction for murder and his sentence of death on direct appeal, is published at 122 Ill. 2d 41, 522 N.E.2d 1109 (1987). The November 19, 1992, decision of the Illinois Supreme Court, affirming the dismissal of Emerson's post-conviction petition, is published at 153 Ill. 2d 100, 606 N.E.2d 1123 (1992). The March 30, 1995, decision of the United States District Court for the Northern District of Illinois, Eastern Division, granting habeas corpus relief with regard to Emerson's sentence of death and denying relief in all other respects, is published at 883 F. Supp. 225 (N.D. Ill. 1995), and reprinted in the appendix to this petition. The July 30, 1996, decision of the United States Court of Appeals for the Seventh Circuit, affirming the district court's decision is published at 91 F.3d 898 (7th

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[1] Petitioner is an inmate of the Illinois Department of Corrections and is currently incarcerated at the Pontiac Correctional Center, in Pontiac, Illinois. Petitioner is in the current custody of Jerry Gilmore, Warden of Pontiac Correctional Center. Warden Gilmore replaced Richard Gramley, the Respondent originally named in the Court of Appeals, after commencement and briefing on this action in the Court of Appeals. Warden Gilmore is the properly named Petitioner in his official capacity as Warden of Pontiac Correctional Center.

Cir. 1996), as reprinted in the appendix to this petition. The September 19, 1996, decision of the Seventh Circuit, denying Emerson's Petition for Rehearing with Suggestions for Rehearing *en banc*, is reported at 1996 U.S. App. LEXIS 24806 (7th Cir. 1996), and reprinted in the appendix to this petition.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered its judgment on July 30, 1996, and rehearing was denied on September 19, 1996. The Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

This case puts in issue §2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214: "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

Additionally, the following Amendments to the United States Constitution are at issue here:

> United States Constitution, Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense."
>
> United States Constitution, Amendment XIV: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

STATEMENT OF THE CASE

Respondent, Dennis Emerson, was convicted by a jury in an Illinois state court of a murder committed in 1979 and was sentenced to death by the same jury. He won a new trial from the state supreme court for trial error, (*People v. Emerson*, 97 Ill. 2d 487, 455 N.E.2d 41 (1983)), and at his second trial, was again convicted and sentenced to death. After an unsuccessful direct appeal, (*People v. Emerson*, 122 Ill. 2d 411, 522 N.E.2d 1109 (1987)), he also failed to obtain any relief in state post-conviction proceedings. (*People v. Emerson*, 153 Ill. 2d 100, 606 N.E.2d 1123 (1992)). Having exhausted his state remedies, Emerson sought habeas corpus relief, pursuant to 28 U.S.C. §2254, in the United States District Court for the Northern District of Illinois, Eastern Division, on the ground that his counsel at the second trial had been incompetent in both the guilt and sentencing phases of the trial. The district court rejected the challenge so far as the guilt phase was concerned, but accepted it with regard to sentencing and ordered that he be resentenced. *United States ex rel. Emerson v. Gramley*,

883 F. Supp. 225 (N.D. Ill. 1995). Both the State and Emerson appealed.

On appeal, the United States Court of Appeals for the Seventh Circuit began by holding that the State had waived application of the newly enacted Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214, which, *inter alia*, amended 28 U.S.C. §2254(d) to require federal courts in habeas corpus proceedings to give greater deference to the determinations made by the state courts than was required under the previous law. (App. at 2). The court noted that three months had elapsed since the enactment of the Antiterrorism and Effective Death Penalty Act (hereinafter, "AEDPA"), without a request by the State to consider its possible bearing on the cross-appeals; therefore, it found the issue waived. (App. at 2).

The Court of Appeals also held that counsel's performance at the sentencing phase was deficient because he failed to conduct any investigation into the possible existence of mitigation evidence, despite the fact that Emerson told both counsel and the judge that he did not want counsel to present any evidence or argument in mitigation. (App. at 14-15).

In an affidavit prepared for purposes of direct appeal before the Illinois Supreme Court, counsel indicated that he did not present evidence in mitigation and did not make an argument at the death sentencing hearing because Emerson did not want him to do so. (R. 2, Vol. I, C.L.R. at 193). Counsel's affidavit stated:

> [T]o the best of my recollection, prior to the day of the trial, I advised Dennis Emerson that in the event he was found guilty and was found death eligible, I

> would explore the possibility of seeking the state's stipulation that the aggravation and mitigation would be the same as the first trial, . . . to the best of my recollection, during the guilt-innocence phase of the trial I may have told Mrs. Jesse Jackson, Dennis Emerson's mother, that I might need her to testify at the sentencing hearing in the event Dennis Emerson was found guilty. . . I ultimately did not present any evidence in mitigation and did not make an argument at the death sentencing hearing because Dennis Emerson did not want me to. . . . Dennis Emerson did not want me to present any evidence in mitigation and he did not want me to make any argument at the death sentencing hearing.

(R. 2, Vol. I, C.L.R. at 193).

The trial record confirms the statements made in counsel's affidavit:

> THE COURT: Have you talked to your client?
>
> [DEFENSE COUNSEL]: Yes, I have, Judge. And my client wishes me to present no evidence, make no argument and wishes to remain in back.
>
> ASSISTANT STATE'S ATTORNEY: Judge, at this point I would ask that he be brought out and state that for himself. I just think that for the record, we probably should have the defendant come out.
>
> THE COURT: Bring him out.
>
> ASSISTANT STATE'S ATTORNEY: For the record.
>
> THE COURT: All right. Mr. Emerson, you heard what your attorney said, *that you basically have no evidence to present in mitigation. And you have no witnesses and you do not wish to be out here*, is that correct, sir?
>
> MR. EMERSON: (nodding).

> THE COURT: Did you hear that in back?
>
> MR. EMERSON: No, I wasn't listening.
>
> THE COURT: Is the speaker on in the back if you want to listen?
>
> MR. EMERSON: Yeah, it's on.
>
> THE COURT: Okay. Fine, sir. *So, you don't want to present any evidence*, is that correct, sir?
>
> MR. EMERSON: *I don't want to.*
>
> THE COURT: Okay. Fine sir. You wish to remain in the back as opposed to sitting in the courtroom?
>
> MR. EMERSON: Yeah.

Emerson II, 122 Ill. 2d at 440, 522 N.E.2d at 1121 (*citing* R. 2, Vol. III, Supp. R. at 584-85) (emphasis added).

Counsel had previously requested the court to order an examination of Emerson's mental condition by Dr. Reifman of the Psychiatric Institute; however, Emerson resisted meeting with Dr. Reifman. (R. 2, Vol. III, Supp. R. at 608, 761). When Emerson was ultimately seen by Dr. Reifman, the following findings were made:

> It is my opinion that this defendant is mentally fit for sentencing. The presumption is based on my examination in which there was very limited cooperation by the defendant. It is my belief that his lack of cooperation was not based upon a mental disease but rather on the defendant's negativism. It is my belief also that his uncooperativeness is willful.

(R. 2, Vol. III, Supp. R. at 762).

Despite this record, the Court of Appeals found that counsel had rendered deficient performance at the sentencing proceeding since he had failed to conduct any investigation into potential mitigating evidence. (App. at 15).

Moreover, the court held that counsel's deficiency at the sentencing hearing "may have been responsible for the death sentence—not certainly of course, but with sufficient probability to establish a denial of the right to effective assistance of counsel at the sentencing phase." (App. at 17). This holding was made, notwithstanding a previous statement by the court, that it had before it what a full investigation would have revealed, the bulk of which would have disclosed "a career of truancy and crime far lengthier than what had been recounted to the jury by the prosecution." (App. at 16). While the evidence in mitigation would also have included the fact that Emerson had an IQ in the dull normal range and had been seriously wounded as a bystander to a holdup when he was eight years old, the court specifically found "these things seem outweighed or at least offset by the mitigation specialist's additional evidence of criminal and other antisocial behavior." (App. at 16). Still, the court found that because no evidence in mitigation had been before the sentencer, "despite irrefutable evidence of aggravating circumstances," and because the sentencer was a jury rather than a judge, counsel's errors were in fact prejudicial, because it could not be said that at least one juror would have found the mitigating evidence (including the death of Emerson's child, possibly strangled by her mother, and the death of one of his brothers by shooting), sufficient to preclude imposition of the death sentence. (App. at 17).

Emerson subsequently filed a petition for rehearing with suggestion for rehearing *en banc*. A majority of the judges on the original panel voted to deny the petition, and none of the active judges requested a vote on the suggestion for rehearing *en banc*.

Petitioner seeks a writ of certiorari from this Court to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD GRANT CERTIORARI WHERE THE SEVENTH CIRCUIT'S DETERMINATION THAT THE STATE WAIVED THE BENEFITS OF AMENDED 28 U.S.C. §2254(d) IS NOT CONSISTENT WITH THIS COURT'S DECISIONS IN *SUMNER v. MATA* AND *LOUISVILLE & NASHVILLE R. CO. v. MOTTLEY*.

A. If The Court Of Appeals Was Correct With Respect To Its Holdings In Connection With Amended §2254(d) In *Lindh v. Murphy*, Then The Court Erred In Not Applying The Provision To The Case At Bar.

If this Court finds that the court of appeals was in fact correct in *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996) (*en banc*), where it held that amended §2254(d) applies to cases that were pending on the date of enactment and bars relief on constitutional claims adjudicated in state court unless the prisoner can "point to an authoritative decision of the Supreme Court," to which the state court's decision is contrary or which the state court applied in an unreasonable fashion, then this Court must find that the court reached an incorrect decision when it refused to apply amended §2254(d) in the case at bar when it concluded that the State waived the benefits of the provision by not specifically directing the court's attention to the new Act.

By holding, in the case at bar, that the State could waive the benefits of §2254(d), the court of appeals relied

on a portion of its decision in *Lindh*. There the court stated:

> We do not suggest that §2254(d) reduces the power of the court in the sense of subject-matter jurisdiction, which survives intact in 28 U.S.C. §2241; a state may waive the benefits of 28 U.S.C. §2254(d), although other provisions of the 1996 Act, such as the revised exhaustion requirement in §2254(b), suggest that counsel's inattention to niceties of federal practice does not forfeit the benefits the law bestows on the state as an entity. *See also Eaglin v. Welborn*, 57 F.3d 496, 498-99 (7th Cir. 1995) (*en banc*) (holding that a court may decide a case on the basis of *Teague* even if the state's lawyers overlooked that possibility).

96 F.3d at 865. *See also Watkins v. Meloy*, 95 F.3d 4, 5-6 (7th Cir. 1996) and *Griffin v. McVicar*, 1996 U.S. App. LEXIS 24891 at *1 (7th Cir. Sept. 23, 1996) (both holding that the provisions of the new Act governing the scope of federal judicial review do not affect the subject-matter jurisdiction of the federal courts, and are therefore waivable).

Petitioner submits that the court of appeals, in holding as it did, ignored this Court's decision in *Sumner v. Mata*, 449 U.S. 539 (1981), in which the Court reaffirmed its 1908 decision in *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149 (1908). In *Sumner*, then-Justice Rehnquist wrote:

> The dissent contents that any argument premised on §2254(d) was 'abandoned' because petitioner raised his §2254(d) argument before the District Court, but did not do so in his appellate brief. (Citation omitted). Presumably, this contention does not

> mean to imply that petitioner conceded error with regard to the state-court factual determinations, but instead that he 'abandoned' his right to rely on §2254(d) as a reason for *not* rejecting these factual determinations. (Emphasis in original). Whether or not the petitioner specifically directed the Court of Appeals' attention to §2254(d) makes no difference as to the outcome of this case. The present codification of the federal habeas statute is the successor to 'the first congressional grant of jurisdiction to the federal court,' *Preiser v. Rodriguez*, 411 U.S. 475, 485, 93 S.Ct. 1827, 1833, 36 L.Ed.2d 439 (1973), and the 1966 amendments embodied in §2254(d) were intended by Congress as limitations on the exercise of that jurisdiction. As we held in *Louisville v. Nashville R. Co. v. Mottley*, 211 U.S. 149, 152, 29 S.Ct. 42, 43, 53 L.Ed. 2d 126 (1908), and have repeatedly since reaffirmed, "it is the duty of this [C]ourt to see to it that the jurisdiction of the [district court], which is defined and limited by statute, is not exceeded." Having had the benefit of the full briefing and argument from the parties on the §2254(d) issue, we are simply following the well-established doctrine of the *Mottley* case in deciding the §2254(d) issue.

449 U.S. at 547 n.2. *see also Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 n.4 (1986).

In accordance with *Sumner*, Petitioner contends that the court of appeals was incorrect in holding that amended §2254(d) does not affect a federal court's subject-matter jurisdiction. Because the court decided an important question of federal law in a way that conflicts with relevant decisions of this Court, this Court should grant the petition for writ of certiorari.

B. Had The Court Of Appeals Not Held That The State Waived The Benefits Of Amended §2254(d), The Result Of Its Opinion On The Merits Would Have Been Different.

Had the court of appeals not found that the State waived the benefits of amended §2254(d), pursuant to its own reasoning in *Lindh*, the result of Emerson's appeal would necessarily have been different. As the court held in *Lindh*, the prisoner "must be able to point to an authoritative decision of the Supreme Court in order to secure a writ." 96 F.3d at 869. In that this Court has never held trial counsel *per se* ineffective for failing to present mitigation evidence at a capital sentencing hearing, the court of appeals exceeded its authority in granting habeas relief.

Under amended 2254(d)(1) any merits consideration of Emerson's claim by the court of appeals should properly have been limited to determining whether the adjudication of that claim "on the merits" in state court: "resulted in a decision that was contrary to, and or involved an unreasonable application of, clearly established federal law as determined by" this Court. *Lindh*, 96 F.2d at 868-871. The court of appeals could also have granted habeas relief under subsection (d)(2) of section 2254 only where the state court adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented" in state court proceedings.

According to *Lindh*, a federal court on habeas review is "free to express an independent opinion" on whether a state court has "deviate[d] from the Constitution" on a legal question "contrary to" United States Supreme Court pronouncements. *See Lindh*, 96 F.2d at 868-870.

However, federal courts cannot express the same sort of "independent opinion" as to state court determinations of mixed questions of law and fact. *See Lindh*, 96 F.3d at 870. Rather, where such mixed questions are concerned, the "unreasonable application" exception "tells federal courts: Hands off, unless the [state court] judgment in place is based on an error grave enough to be called "unreasonable." *Lindh*, 96 F.3d at 870. And so, where the state court offers "a responsible, thoughtful answer" after "a full opportunity to litigate" the question, a federal court on habeas review must accept that answer as "adequate to support the judgment." *Lindh*, 96 F.3d at 871. In other words: once the state court asks "the legally correct question," effectively identifying the applicable constitutional rule, the state court's analysis of the facts against the constitutional rule—the "fact-specific answer"—cannot be termed 'unreasonable' even if it is wrong[.]" *See Lindh*, 96 F.3d at 876-77.

The Illinois Supreme Court, in rejecting Emerson's claim of ineffective assistance of counsel for failure to present any evidence of mitigation at the capital sentencing hearing, relied in part on its own decision in *People v. Gaines*, 105 Ill. 2d 79, 473 N.E.2d 868 (1984). In *Gaines*, the state high court engaged in a lengthy discussion of this Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984), and noted that in two previous cases, it expressly adopted the *Strickland* standard for challenges to effectiveness of both retained and appointed counsel. It then applied the correct standard to the facts of the case. *Gaines*, 105 Ill. 2d at 92-94, 473 N.E.2d at 875-876. Therefore, in applying *Gaines* to Emerson's case, the Illinois Supreme Court, in effect, applied the correct standard under *Strickland*. And, as the court of

appeals itself held in *Lindh*, the state court's "fact-specific" determination, arrived at after applying that standard to the case in question, "cannot be called 'unreasonable' even if considered by the federal court to be wrong." *Lindh*, 96 F.3d at 876-77.

The Illinois Supreme Court, in its thoughtful analysis, made the following findings:

> [T]he defendant's record shows a virtually uninterrupted history of criminal conduct that began in 1971 and that culminated in the offenses for which the defendant was sentenced to death. During that period the defendant was convicted of a series of armed robberies, and he committed the offense here within a month of his parole from prison.

Emerson, 122 Ill. 2d at 411, 439, 522 N.E.2d 1109 (1987).

Moreover, quoting from a colloquy which took place among counsel, Emerson and the trial judge, the state high court stressed that counsel's conduct at the sentencing hearing was consistent with Emerson's wishes. *Emerson*, 122 Ill. 2d at 440, 522 N.E.2d at 1121. It therefore concluded that Emerson had not been denied his Sixth Amendment right to effective assistance of counsel. The court of appeals should have deferred to this conclusion.

II.

THIS COURT SHOULD GRANT CERTIORARI WHERE THE SEVENTH CIRCUIT'S DETERMINATION THAT EMERSON WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING IS CONTRARY TO ESTABLISHED LAW.

The court of appeals has fashioned an overbroad rule of law, with dangerous precedential consequences, by

holding that trial counsel may be found ineffective when he fails to produce mitigating evidence at a capital sentencing hearing, even though his decision is based upon the words and actions of his client. The decision of the court of appeals seemingly also fashions a rule, without providing adequate guidelines, which would require trial judges to conduct in-depth interrogations of capital defendants, which undoubtedly would invade the sanctity of the attorney-client privilege, before a defendant's waiver of his right to present mitigating evidence can be accepted. This decision is not only contrary to the law, but simply put, it is bad law, which must be remedied by this Honorable Court.

The decision of the court of appeals is in direct contravention of the injunction which this Court set forth in *Strickland v. Washington*, 466 U.S. 668 (1984):

> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. . . . In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions.

Id. at 691. This Court also stated that counsel's failure to introduce mitigation evidence at a capital sentencing hearing does not *per se* result in a finding of ineffective assistance of counsel. *Id.* at 698. Accordingly, this Court has emphasized that trial counsel is entitled to a great

deal of deference regarding matters of strategy and counsel's decision not to present mitigation evidence will be deemed competent when viewed in terms of counsel's overall trial strategy. *Burger v. Kemp*, 583 U.S. 776, 789 (1987).

However, the court of appeals has ignored these rules of law and through its decision has fashioned a *per se* rule of ineffective assistance of counsel when there is mitigating evidence which may be presented but is not (undoubtedly there is some mitigating evidence about any capital defendant), regardless of the capital defendant's express desires that no such evidence is to be presented. In the habeas proceedings below defense counsel prepared an affidavit wherein he stated:

> [T]o the best of my recollection, prior to the day of the trial, I advised Dennis Emerson that in the event he was found guilty and was found death eligible, I would explore the possibility of seeking the state's stipulation that the aggravation and mitigation would be the same as the first trial, . . . to the best of my recollection, during the guilt-innocence phase of the trial I may have told Mrs. Jesse Jackson, Dennis Emerson's mother, that I might need her to testify at the sentencing hearing in the event Dennis Emerson was found guilty. . . I ultimately did not present any evidence in mitigation and did not make an argument at the death sentencing hearing because Dennis Emerson did not want me to. . . . Dennis Emerson did not want me to present any evidence in mitigation and he did not want me to make any argument at the death sentencing hearing.

(R. 2, Vol. I, C.L.R. at 193) Thus, in accord with *Strickland*, counsel's conversations with defendant concerning

the presentation of mitigating evidence were revealed and laid before the court of appeals. Unfortunately, that court simply chose to ignore this vital information in reaching its decision.

It is clear that counsel was acting in conformity with his client's wishes at the sentencing hearing. However, the rule of law established by the court of appeals now requires counsel to ignore his client's express directions. It is clear that this is not, and cannot, be the law, as it forsakes the time-honored, and constitutionally protected, right of a criminal defendant to be the ultimate arbiter of the presentation of the defense.

Moreover, Emerson's directive to his attorney that no mitigation evidence was to be presented at the sentencing hearing is clearly confirmed by the record:

> THE COURT: Have you talked to your client?
>
> [DEFENSE COUNSEL]: Yes, I have, Judge. And my client wishes me to present no argument and wishes to remain in back.
>
> ASSISTANT STATE'S ATTORNEY: Judge, at this point I would ask that he be brought out and state that for himself. I just think that for the record, we probably should have the defendant come out.
>
> THE COURT: Bring him out.
>
> ASSISTANT STATE'S ATTORNEY: For the record.
>
> THE COURT: All right. Mr. Emerson, you heard what your attorney said, that you basically have no evidence to present in mitigation. And you have no witnesses and you do not wish to be out here, is that correct, sir?
>
> MR. EMERSON: (nodding).

THE COURT: Did you hear that in back?

MR. EMERSON: No, I wasn't listening.

THE COURT: Is the speaker on in the back if you want to listen?

MR. EMERSON: Yeah, it's on.

THE COURT: Okay. Fine, sir. So, you don't want to present any evidence, is that correct, sir?

MR. EMERSON: I don't want to.

THE COURT: Okay. Fine sir. You wish to remain in the back as opposed to sitting in the courtroom?

MR. EMERSON: Yeah.

(R. 2, Vol. III, Supp. R. at 584-85). Thus, not only was Emerson's desire not to present mitigating evidence clearly communicated to the court, but his refusal to sit in the courtroom also clearly demonstrated that he did not wish to participate in the sentencing hearing in any manner. Given Emerson's instructions to his attorney, his express desires as stated in open court, and his refusal to remain in the courtroom during the sentencing hearing, the unreasonableness of the court of appeals' decision becomes glaringly obvious. That decision now requires an attorney to act in contravention of his client's instructions. This is an untenable rule of law and this Court should reverse it.

The court of appeals also felt that the trial court's admonitions to Emerson were insufficient to warn him of the consequences of his decision to forego the presentation of mitigation evidence. First the court seemingly interprets the Illinois Death Penalty Statute (720 ILCS 5/9-1(g)) to mean that if no mitigation evidence is presented a sentence of death is mandatory. That, however,

is not now, and never has been, the law in Illinois. The sentencing authority may look to any potential mitigating evidence regardless of whether it was presented at the sentencing hearing. Thus, a trial judge cannot inform the defendant that his failure to present mitigating evidence will result in the imposition of a death sentence. While the failure to present such evidence at the hearing may work to the defendant's disadvantage, it does not automatically result in the imposition of the death penalty.

The decision of the court of appeals leaves open for interpretation the extent of questioning a trial judge must engage in before he accepts the defendant's decision not to present evidence in mitigation. For instance, is the trial judge to ask defendant what type of mitigating evidence he may have and then, after reviewing it, characterize it as strong, weak or simply mediocre. Should the trial judge then ask the defendant about his discussions with his attorney concerning mitigation evidence, thereby violating the sacrosanct privilege of the attorney-client relationship. The different scenarios which will arise from the holding will be numerous.

The decision of the court also ignores one very important fact, and that is, that this defendant had previously gone through a sentencing hearing where death was imposed and thus knew that the failure to present mitigating evidence, which he also chose not to do at that first hearing, would substantially increase the likelihood that death would be imposed.

The decision of the court in this regard is result-oriented. In so acting the court has failed to establish adequate guidelines for trial judges to follow in determin-

ing whether a capital defendant can forego the right to present mitigation evidence. The result, as outlined above, will result in questioning that will be confusing to the defendant, if not outright detrimental to him, and which will undoubtedly interfere with the attorney-client privilege.

In sum, this Honorable Court must grant certiorari in order to reverse the decision of the court of appeals because it is in direct contravention of this Court's opinions and sets a dangerous precedent which will result in not only cumbersome sentencing hearings but will also place a crushing burden on our criminal justice system as it strives to interpret the untenable rule of law which the court has laid down.

CONCLUSION

For the aforementioned reasons, Petitioner respectfully requests this Court to find that: (1) the United States Court of Appeals for the Seventh Circuit's decision below erroneously concluded that the State had waived application of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214, and (2) the Seventh Circuit's analysis under the *Strickland v. Washington*, standard so conflicts with prior rulings of this

Court as to compel the Court to grant Certiorari either by plenary consideration or summary reversal.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 95-2988, 95-3018

DENNIS EMERSON,

Petitioner-Appellant, Cross-Appellee,

v.

RICHARD B. GRAMLEY, Warden,
Pontiac Correctional Center,

Respondent-Appellee, Cross-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 93 C 4650—**Marvin E. Aspen**, *Chief Judge.*

ARGUED APRIL 23, 1996—DECIDED JULY 30, 1996

Before POSNER, *Chief Judge*, and BAUER and RIPPLE, *Circuit Judges.*

POSNER, *Chief Judge.* Dennis Emerson (also known as Dennis Jackson) was convicted by a jury in an Illinois state court of a murder committed in 1979 when he was 27 years old, was sentenced to death by the same jury, won a new trial from the state supreme court for trial error, *People v. Emerson*, 455 N.E.2d 41 (Ill. 1983), at his second trial was again convicted and sentenced to death, appealed unsuccessfully, *People v. Emerson*, 522 N.E.2d 1109 (Ill. 1987), failed to obtain any relief in state postconviction proceedings, *People v. Emerson*, 606

N.E.2d 1123 (Ill. 1992), and having thus exhausted his state remedies sought habeas corpus in the federal district court in Chicago on the ground that his counsel at the second trial had been incompetent in both the guilt and sentencing phases of the trial. The district court rejected the challenge so far as the guilt phase was concerned but accepted it with regard to sentencing and ordered that he be resentenced. *United States ex rel. Emerson v. Gramley*, 883 F. Supp. 225 (N.D. Ill. 1995). Both sides appeal.

The day after the appeals were argued to us, President Clinton signed into law the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214, which among other things amends 28 U.S.C. § 2254(d) to require federal courts in habeas corpus proceedings to give greater deference to the determinations made by state courts than they were required to do under the previous law. Although three months have elapsed since the enactment of this highly publicized law, the state has not asked us to consider its possible bearing on these appeals, and we consider the issue waived. *Rivera v. Department of Corrections*, 915 F.2d 280, 283 (7th Cir. 1990). Of course, if the issue goes to the subject-matter jurisdiction of the federal district court, it cannot be waived, and we must consider it on our own. But we do not think it does. It affects the scope of federal judicial review of state court determinations rather than the power of review. Cf. *Eaglin v. Welborn*, 57 F.3d 496, 498-99 (7th Cir. 1995) (en banc).

Here, briefly, are the facts out of which this proceeding arises. Robert Ray, an acquaintance of Emerson's, owned and operated a bar in Chicago. On the fatal day Emerson called Ray several times and told him that he was coming to see him. Emerson arrived with his brother Richard Jackson between 1:15 a.m. and 2 a.m., shortly after the bar closed. Ray, Emerson, and Jackson sat and talked in Ray's apartment, which was at the back of the bar. Ray's girlfriend, Delinda Byrd, joined them. According to Ray's testimony at both trials, at some point after

she arrived and Ray returned from a brief trip to a store to buy cigarettes Emerson pulled out a gun, ordered Ray and Byrd to lie on the floor, bound their hands and feet with electrical cord, and then ransacked the apartment for guns and jewelry. He also searched the two victims and, finding about $600 on Byrd, took it. Jackson found a blade from a broken scissors or shears in the kitchen of the apartment and gave it to Emerson, telling him, "Here, Dennis, use these." Emerson stabbed Ray twice in the chest and Byrd five times in the back. Then he set a fire in the bedroom of the apartment and with Jackson's help dragged Ray and Byrd into the bedroom and fastened the door from the outside with a coat hanger. Emerson and Jackson then left the apartment.

Ray managed to free his hands, hobble over to the window (his feet were still tied together), and fall out, dropping six or eight feet to the bottom of the airshaft between his building and the one next door. Byrd managed to follow him into the airshaft. Ray untied his feet and her hands and feet. Ray (but not Byrd) was able to get into a different room of the apartment through a window giving on the airshaft. He rushed out of the building, which was now burning furiously. The fire department had already been summoned. Firemen arrived at about 4 a.m., but were unable to extricate Byrd from the airshaft until they put out the fire. By then she was dead from burns and loss of blood. Ray told the police at the scene that Jackson and Emerson had been the assailants, and police immediately went to the brothers' home, arriving at 4:15 a.m. but finding no males there. Ray spent nine days in hospital recovering from the stab wounds and smoke inhalation.

Jackson and Emerson were tried together. Although Jackson was found guilty of murder along with Emerson, he was not sentenced to death, perhaps because, unlike Emerson, he had not done the stabbing or burning and, also unlike Emerson, he was not convicted of arson. Both were convicted of attempted murder and armed robbery as well as of murder. Jackson, like Emerson, won a new

trial on the basis of trial error. *People v. Jackson*, 458 N.E.2d 59 (Ill. App. 1983). In the second round, Jackson and Emerson were again tried together, but Jackson waived a jury, with the result that the judge (the same judge, incidentally, who had presided at the first trial of the two defendants) was the trier of fact in his case. The judge convicted him, and this time the conviction was upheld on appeal. *People v. Jackson*, 507 N.E.2d 89 (Ill. App. 1987).

Ray was the principal witness for the prosecution at both trials, for no fingerprint or other physical evidence tying the defendants to the crime was produced and neither the half scissors or shears used in the stabbings nor any of the things stolen from Ray's apartment have ever been found. At Emerson's first trial, Ricky Jackson, another of Emerson's brothers, testified that he (Ricky) was not at Emerson's house the night of the murder. Emerson took the stand in that trial, denied any involvement in the crimes, and was impeached with his lengthy criminal record. He testified, contradicting Ricky, that Ricky had been sleeping on the couch in the living room of their home on the fatal night while he was in the basement listening to records until 5 a.m. He also testified, contradicting himself, that he had left home at 3:30 or 4 to visit his ex-wife. He testified that before the murder he had lent Ray $5,000 from the proceeds of a bank robbery and had been unable to obtain repayment. The theory of the defense was that Ray had accused Emerson of participation in the murder in order to avoid having to repay the loan. The jury wasn't buying, but Emerson's conviction was reversed because of improper statements by the prosecution and erroneous evidentiary rulings, including the admission of a prior consistent statement by Ray. Despite the strength of the case against Emerson, the state supreme court held that the errors and improprieties had not been harmless.

The lawyers who represented Emerson at his first trial did not represent him at his second trial, apparently because he could no longer afford to pay their fees. A lawyer named Earl Washington was appointed at the request of Emerson and his family to represent him. But a year later, shortly before the trial, Washington resigned the

appointment because of "serious philosophical differences" with Emerson; the nature of those differences is not known. An assistant public defender named James Sammons was appointed to succeed Washington. Sammons had extensive trial experience, but it was not recent, because he had been a supervisor in the public defender's office for several years. He had tried one capital murder case in his career, but that had been before the U.S. Supreme Court developed its complicated jurisprudence of capital punishment.

Sammons reviewed the transcript of the first trial and met with Emerson once or twice before the second. The total length of this meeting or these meetings is unclear; it may have been as short as 45 minutes, or it may have exceeded an hour and a half. Sammons decided to follow a different strategy at the forthcoming trial from the one that had been employed by Emerson's lawyers at the first trial: he would try to plant in the minds of the jurors, through cross-examination of Ray, the suspicion that Ray himself had murdered Byrd. Sammons stated in his deposition that before the trial began he had told Emerson and Richard Jackson "that my feeling was that Robert Ray was lying and that he would only have one or two possible motives for lying, and that one of them being himself was responsible for the arson, for the murder, and they [Emerson and Jackson] seemed to find no fault with that theory whatsoever." Elaborating, Sammons described his theory of defense in the following words: that "Robert Ray was lying; that he was lying about being secured in the burning room by means of wire binding the door closed; that he was lying about being beaten and stabbed; that he was lying about the way he described what happened immediately after the offense. . . . [I]t's quite common for persons who commit crimes in their own abode or place of business to set fire to the place to more or less cover what happened."

Sammons' strategy did not require that he call any witnesses. He did not want to call any. The only possible witnesses for the defense would have been members of

Emerson's family, testifying as alibi witnesses, and it was plain from the first trial that Emerson's alibi would be ripped apart. Sammons wanted to base the defense on undermining the credibility of the prosecution's key witness. Since there was no other evidence of Emerson's guilt except Ray's testimony, if the jury could be made to doubt the truthfulness of that testimony it might decide that there was reasonable doubt and acquit without Emerson or his family having to testify only to get skewered on cross-examination.

The trial began and Sammons did manage to elicit from Ray that Ray had had arguments (though not fights) with his girlfriend and had not tried to staunch her bleeding or help her out of either the apartment or the airshaft. And he used Ray's testimony that Emerson had telephoned him repeatedly before coming over to intimate that such conduct was inconsistent with Emerson's having intended to rob Ray, since if before Emerson arrived Ray happened to tell anyone that Emerson was coming to visit him this would immediately cast suspicion on Emerson when the murder was discovered. Sammons also argued that it was unlikely that Emerson would have let Ray leave to buy cigarettes if he had been planning to rob him, since Ray might become suspicious and not return or might happen to mention to someone that Emerson and Jackson were in his apartment. Sammons' cross-examination of Ray was brief and, indeed, judging from the transcript, rather perfunctory, but it would have given Sammons some ammunition for use in closing argument had that argument not been derailed, as we shall see, by an unexpected development.

At a break in the case, Emerson announced, referring to Sammons, "I don't want this guy here." He said that Sammons was "not doing anything. . . . [H]e ain't said nothing to me about no strategy . . . [and] when I sit over there asking about my people testifying, he tell me he not going to let my people testify." (Before the second trial, Emerson and Richard Jackson expressed continual dissatisfaction with their lawyers and peppered the

trial judge with pro se motions, bypassing their lawyers.) Emerson was upset in part because Jackson's lawyer had asked more questions in cross-examining Ray than Sammons had, though the questions hadn't undermined Ray's testimony in the slightest. Emerson may have sensed a lack of energy or commitment in Sammons and may not have understood his strategy; indeed, it is conceivable that he did not know what it was. The judge refused to give Emerson a new lawyer in the middle of the trial, whereupon Emerson joined his brother—who did not like the idea of the jury being present when he had waived a jury trial—in the holding cell behind the court.

After the completion of the prosecution's case in chief, Emerson asked Sammons to call his mother and his brothers Ricky and Richard Jackson as witnesses for the defense. Sammons made clear that "all of this is over my advice to Mr. Emerson." He could have refused to call the witnesses, see *Weber v. Israel*, 730 F.2d 499, 508 n. 7 (7th Cir. 1984), because the decision whether or not to call a witness is a lawyer's tactical decision on which consultation with the client is not required. E.g., *United States v. Ramos*, 832 F.2d 85, 88 (7th Cir. 1987); *United States v. Curtis*, 742 F.2d 1070, 1074-75 (7th Cir. 1984) (per curiam). This is provided that the decision rests on an adequate foundation, e.g., *Montgomery v. Petersen*, 846 F.2d 407, 412-14 (7th Cir. 1988), but Emerson does not cite Sammons' acceding to his direction as an instance of incompetent representation. Ricky Jackson tried to give testimony concerning Emerson's alleged loan, but this was objected to as hearsay and he stepped down without providing anything helpful to the defense. Sammons did not try to get the evidence of the loan into the case by some other means.

Emerson's mother, who would have testified that Emerson was home until 3:30 a.m. on the night of the murder, then took the stand. Sammons said he had no questions to ask her, thinking that Emerson would be questioning her (Emerson had done some of the questioning of Ricky). But Emerson did not question her, because as soon as

she was seated in the witness box he demanded to be returned to the lock-up. He was taken away, and she stepped down without testifying.

He came back, and wanted his brother Richard called. The judge, till then (and later) a model of patience, was becoming exasperated. He said, "I believe now all Mr. Emerson is attempting to do is to foul up the record as he has done throughout the entire trial, tried to delay it, antics at this time only shows me that all he wants to do is attempt to foul up the trial." Nevertheless, the judge agreed to have Richard called to the stand. Against the advice of his lawyer, Richard waived his Fifth Amendment right not to testify against himself (for he was still on trial too) and proceeded to corroborate virtually everything to which Ray had testified—including Richard Jackson's own role in the murder—except the identity of the other murderer. Richard said it was not Emerson but "Phillip Anderson." The existence of "Phillip Anderson" has never been confirmed. Jackson, who had not testified at either of his own trials, admitted that he had never told this story to anyone before. Sammons had no reason to think that Jackson would testify to anything but an alibi, since in the conversation that Sammons had had with Emerson and Jackson before the trial both defendants had said that they did not know who the murderer was.

Although Richard Jackson did mention in his testimony that Ray had owed Dennis Emerson some money (so the evidence of the loan came in after all), the testimony taken as a whole, in which he admitted that he and Anderson, not Ray, had killed Byrd, sank Sammons' theory of defense. Closing argument followed shortly upon Jackson's testimony, and Sammons found himself with very little to say. He did not attempt to argue to the jury that Emerson had not committed the murder. He contented himself with arguing that Emerson had not planned to rob Ray; exactly how that argument could help his client remains obscure. At the sentencing hearing, held the next day before the same jury, Sammons had nothing to say.

He had made no attempt to interview witnesses who might testify on Emerson's behalf at the sentencing hearing; he had not, so far as appears, even discussed possible approaches to take at the hearing. Emerson instructed him to present neither evidence nor argument at the hearing and declined to present witnesses or make any statement himself.

Regarding the guilt phase of the trial as distinct from the sentencing phase, Emerson argues that Sammons should have stuck with the strategy of the first trial. Although unsuccessful, that strategy had had enough merit to dissuade the state supreme court from finding that the errors committed at that trial had been harmless. Emerson argues further that Sammons should have conferred at greater length with him before the trial; should have investigated the possibility of a convincing alibi defense rather than rely on the transcript of the first trial to conclude that such a defense would be futile; should not have embarked on a completely new theory of defense without some preliminary investigation; should have given an opening statement; should have cross-examined Ray more vigorously; should have called Emerson as a witness; should not, as he virtually did, concede Emerson's guilt in his closing statement; and should have looked for evidence of mitigation.

Chief Judge Aspen rejected all the claims of ineffective assistance of counsel at trial. Some of them he rejected on the basis of waiver. These were the grounds that the state supreme court had rejected in Emerson's state post-conviction proceeding on the basis of res judicata: Emerson could have presented the claims in his direct appeal but did not. Chief Judge Aspen thus equated res judicata and waiver as defenses to grounds for challenging a conviction that might have been presented earlier. Was he right to do so? Probably not. The law of the state that issues the judgment determines its preclusive scope in any subsequent federal proceedings, 28 U.S.C. § 1738, and it appears that the Illinois courts intend their judgments in criminal appeals to have preclusive effect only in subse-

quent proceedings in those courts. *People v. Kokoraleis*, 637 N.E.2d 1015, 1019 (Ill. 1994); cf. *Ylst v. Nunnemaker*, 501 U.S. 797, 804 n. 3 (1991); *Prihoda v. McCaughtry*, 910 F.2d 1379, 1385 (7th Cir. 1990). If you waive or forfeit a claim, it's ordinarily barred forever, in any court system. A familiar example is a rule requiring a contemporaneous objection to the admission of evidence. Although we don't usually think of res judicata as having quite that force, the practical effect, at least within a unitary court system, is much the same: if you "split" your claim, reserving part of it for a later suit, the defendant will be able to interpose the defense of res judicata to that suit, barring you from litigating the claim. From language in the state supreme court's opinion in the postconviction case ("we find that the defendant did not present any claim which was not barred by the doctrine of *res judicata* or waiver," 606 N.E.2d at 1127), it appears that that court may indeed have thought of waiver and res judicata as synonymous. The decision preceded *People v. Kokoraleis*, however, raising the question whether the later decision changed the law and if so with retroactive effect. Probably not; *Kokoraleis* does not purport to be announcing a new rule. We need not plunge deeper into this briar patch. For the state argues, we think correctly, that none of the possibly waived claims of ineffective assistance, or for that matter all the waived and nonwaived together, deprived Emerson of his constitutional right to the effective assistance of counsel during the guilt phase of his second trial.

The transcript of the first trial—which could have been used to impeach any contradictory evidence at the second trial by witnesses who had testified at the first, cf. Fed. R. Evid. 801(d)(1)(A)—would have suggested to the reader that the alibi defense was going nowhere and that Emerson's denials of guilt, given his lengthy criminal record and contradictory alibi defense, would have little appeal to a jury even if the jurors believed that Ray had owed Emerson money—money Emerson had obtained from a bank robbery. The alternative strategy of "trying the victim" was desperate. But the situation was desperate,

and we cannot say that Sammons was incompetent in deciding to adopt it. The evidence before the district judge concerning Sammons' representation did not require the judge to find that Sammons had adopted this strategy over Emerson's objections, though in the course of the trial Emerson repudiated it. The waiver of opening argument has no significance, given the strategy: Sammons would not want to tip his hand to Ray and the prosecutors before his cross-examination of Ray began. Sammons could have reserved opening argument to the close of the state's case, but there would have been no point since he was not planning to present any witnesses. The close of the prosecution's case in chief would be the end of the evidentiary phase of the case. A reserved opening argument would step on the heels of the closing argument.

The strategy was okay, the execution of it deplorable. Sammons conducted no investigation, cross-examined Ray weakly, and was inept in his efforts to extract evidence about the loan from Ricky Jackson. The closing argument was a total flop, though here the blame may lie more with Emerson than with Sammons. Emerson insisted, against his lawyer's judgment, on calling his brother Richard Jackson as a witness. Nothing a mother or brother would testify to was likely to help Emerson, but Richard Jackson's testimony turned out to be a disaster because it corroborated Ray's testimony except in the incredible substitution of "Phillip Anderson" for Dennis Emerson. It is mere speculation that Sammons could have headed off this disaster by interviewing Richard Jackson and then advising Emerson not to insist on Jackson's being called as a witness. He would have been telling Emerson that even though his brother was prepared to confess his own part in the murder and exculpate Emerson, it would be better not to call him as a witness because his testimony would actually rehabilitate Ray's testimony. Advice like that if taken would have formed the cornerstone of Emerson's claim (we do not say a successful one) of ineffective assistance of counsel.

We suppose, although we have not been able to find any cases on the point, that if Emerson lost confidence in Sammons because of the latter's incompetence and reacted by taking over his defense and making dumb decisions, like calling his brother as a witness, those decisions might be attributed to the lawyer rather than to the client. Had Sammons demonstrated incompetence at the point at which Emerson told the judge that he considered Sammons incompetent? This is difficult to say. On the one hand, he had a viable strategy which guided a cross-examination of Ray that elicited a few of the points that Sammons had wanted to elicit. Sammons had good reasons not to put on witnesses and to waive opening argument. Having read the transcript of the first trial he had less reason than would normally be the case to interview potential witnesses, none of whom could stray far from their previous testimony without being nailed by that very transcript. And the fact that this was the rerun meant that he did not have to spend as much time conferring with his client in advance of trial as he would normally have had to do. He was a senior and experienced public defender (though subsequently demoted) and he had only a little more than a month to prepare for trial between the discharge of Washington and the commencement of the second trial. Emerson's current lawyers, whose zeal and competence in the advocacy of their client's cause cannot be doubted (their briefs in this court total 101 pages), describe Jackson's testifying as a "misfortune" rather than as the consequence of Sammons' incompetence. Emerson may have had an *idée fixe* about having "his people" testify from which no lawyer could have dissuaded him. On the other hand, it is not at all clear that Sammons had explained his strategy adequately to Emerson or won the latter's acquiescence in it, and the perfunctory character of his cross-examination of Ray may reasonably have seemed to Emerson a sign that his lawyer had abandoned his cause.

The misfortune of Richard Jackson's testifying put Sammons off his stride, perhaps without fault on his part; but

he should have done better than to offer a perfunctory closing argument in which virtually the only thing he said on his client's behalf was that Emerson had not intended to commit armed robbery, which was irrelevant. The closing argument occupies only two pages of the transcript, and half of it is taken up by the prosecutor's objections. We need not decide, however, whether in the closing argument, or even earlier, Sammons fell below the minimum standard of representation required of a criminal lawyer. In order for this to be a ground for upsetting the conviction, the lapse would have to be prejudicial, which is to say likely to have made a difference in the outcome of the trial. *Strickland v. Washington*, 466 U.S. 668, 695 (1984); *United States v. Wolf*, 787 F.2d 1094, 1100 (7th Cir. 1986). This condition is not satisfied. Given Richard Jackson's testimony, which corroborated the very aspects of Ray's testimony that Sammons had tried to undermine in his cross-examination of Ray, Emerson simply had no defense to the charges against him. He would have been in better shape had Sammons repeated the strategy followed at the first trial. But that is the wisdom of hindsight. Had Jackson not testified, Sammons' strategy would have been intact. It was not a winning strategy, but neither was the alibi defense attempted at the first trial. It was a reasonable strategy given the lack of a good alternative, and that is all that the Constitution requires.

Even if Jackson's testifying can be laid at Sammons' feet, and even if Sammons' cross-examination of Ray was too lackluster to come up to the minimum standard for the representation of a criminal defendant at trial, Emerson has failed to show that he was harmed. He had no chance of acquittal. We know this because Richard Jackson's lawyer, who cross-examined Ray at length and is not claimed to have been incompetent, did not lay a glove on Ray. After two trials and vigorous cross-examination by at least three lawyers (two at each trial, but we are excluding Sammons' cross-examination), Ray's testimony was intact—consistent both internally and with all the physical and other evidence presented. Against this,

Emerson had only an unbelievable alibi defense and the unbelievable testimony of his brother about a nonexistent "Phillip Anderson."

We turn to the sentencing phase of the case. Under Illinois law, both when Emerson was sentenced and today, if the jury finds (beyond a reasonable doubt) at least one aggravating circumstance of murder, and finds no mitigating circumstances, a sentence of death is mandatory. Ill. Rev. Stat. ch. 38, ¶ 9-1(g) (1979); 720 ILCS 5/9-1(g). Yet it is sometimes a sound defense strategy to offer no evidence of mitigating circumstances. *Darden v. Wainwright*, 477 U.S. 168, 186 (1986). The narratives that defense counsel and their "mitigation specialists" present often contain material that the jury is likely to consider aggravating rather than mitigating. *Burger v. Kemp*, 483 U.S. 776, 793 (1987); *Stewart v. Gramley*, 74 F.3d 132, 137 (7th Cir. 1996). The mitigation specialist and the mitigation witnesses tell the story of the defendant's life, and it is often a life of crime. So in a case in which the jury might doubt the prosecution's evidence of aggravating circumstances, the presentation of evidence of mitigating circumstances can sink the defendant by filling in the gaps in the prosecution's case. As a matter of fact, the mitigation story that Emerson's current lawyers say that Sammons should have presented contains a number of criminal acts (the arson, the armed robbery, the attempted murder, and a number of Emerson's previous crimes) that were omitted from the prosecution's enumeration of aggravating circumstances.

But fear of strengthening the prosecutor's argument for the death penalty was not the reason why no mitigation evidence was presented at Emerson's second trial. (No such evidence was presented at his first, either; we have not been told why.) Sammons did not advise Emerson, and so far as we know did not believe, that presenting evidence in (attempted) mitigation would only make matters worse. Rather, Emerson told Sammons, and then the judge, that he didn't want Sammons to present any evidence or argument in mitigation. Why not? By this time

Emerson was, or at least pretended that he was, thoroughly disgusted with Sammons; given Sammons' poor performance at the closing argument on guilt, held just one day earlier, Emerson's loss of confidence in Sammons cannot be assumed to be entirely feigned. And Sammons had failed to conduct *any* investigation, however brief, into the possible existence of evidence of mitigating circumstances. Compare *Burger v. Kemp, supra*, 483 U.S. at 790-95. Without such an investigation, Sammons could not advise Emerson whether to try to present evidence of such circumstances. Nor did either Sammons or the trial judge warn Emerson of the fell consequences of failing to establish some mitigating circumstances, without which (because the evidence of aggravating circumstances was overwhelming) a sentence of death was certain unless the jury disobeyed the judge's instructions. Previous decisions in which a decision not to introduce evidence in mitigation has been found consistent with effective assistance of counsel have emphasized that lawyer and judge warned the defendant of the consequences of the decision. *Blystone v. Pennsylvania*, 494 U.S. 299, 306 n. 4 (1990); *Silagy v. Peters*, 905 F.2d 986, 1007 (7th Cir. 1990). There were no warnings here, so far as the record discloses.

This is not a case like *Darden* in which the decision not to put on a case in mitigation is a strategic decision made only after an investigation of the possibilities. Sammons' failure to investigate and failure to warn of the consequences of standing mute (a failure that the trial judge might have cured by warning Emerson himself, but did not) brought his representation of Emerson during the sentencing phase below the minimum level of competent representation—unless it can be said that Emerson would have refused to permit argument or evidence no matter what Sammons or the trial judge had said and done. We do not think it is possible to say this. Emerson did not know what an investigation of his personal history would bring out that might help him with the jury and was not told that without an effort to persuade the jury to exercise lenity he was doomed.

Given the unusual circumstances that we have recounted, Emerson's waiver of his procedural rights at the sentencing hearing cannot be considered a knowing waiver to which he should be held. And this brings us to the question whether there is any realistic possibility that Sammons' failures at the sentencing hearing made any difference in the outcome. If not, we cannot disturb the sentence. *Schneider v. Delo*, 85 F.3d 335, 339-41 (8th Cir. 1996).

We know now what a full investigation would have revealed: that Emerson is a dull normal (IQ in the 80s) who was seriously wounded as a bystander to a holdup when he was 8 years old, and who had a continuous record of truancy and criminality from early youth (after the wounding) to the murder. No theory is offered as to why being wounded as a child would turn a person into a murderer as an adult, rather than making the adult gun-shy. The bulk of the mitigation specialist's report narrates a career of truancy and crime far lengthier than what had been recounted to the jury by the prosecution. Even if the IQ and the wound could be thought mitigating, these things seem outweighed or at least offset by the mitigation specialist's additional evidence of criminal and other antisocial behavior.

These considerations would be decisive against Emerson if *some* evidence in mitigation had been before the jury and the question was whether more should have been, as in *Burger v. Kemp* or *Stewart v. Gramley*, or perhaps even if, as in *Stewart*, the sentencer had been the judge rather than a jury. With no evidence of mitigation before the jury despite irrefutable evidence of aggravating circumstances, with need to convince only one of twelve jurors to refuse to go along with a death sentence, and with no statutory or caselaw definition of mitigating circumstances that might enable us to say that the mitigating circumstances found in the investigation by Emerson's current lawyers are in fact irrelevant, see *People v. Ramey*, 604 N.E.2d 275, 290 (Ill. 1992); *People v. Hope*, 658 N.E.2d 391, 412 (Ill. 1995), the possibility that a case in mitigation along the lines devised by these lawyers

might have saved Emerson from the death penalty cannot confidently be reckoned trivial. The mitigation specialist's 30-page single-spaced report is a moving narrative of a life that one juror in twelve might find so bleak, so deprived, so harrowing, so full of horrors (including the death of Emerson's child, possibly strangled by her mother, and the death of one of Emerson's brothers by shooting), as to reduce Emerson's moral responsibility for the murder of Byrd to a level at which capital punishment would strike that juror as excessive or one or more of the jurors would think Emerson deserving of mercy. See, e.g., *People v. Starnes*, 652 N.E.2d 1177, 1181 (Ill. App. 1995); *People v. Morrow*, 647 N.E.2d 1100, 1103, 1107 (Ill. App. 1995).

Starnes was a bench trial; so it provides particularly strong support for the proposition that Emerson might have avoided the death penalty had evidence in mitigation been presented. In *Stewart*, the fact that the jury was not swayed by the evidence in mitigation that was presented made it highly unlikely that additional such evidence, unimpressive in itself, would have made a difference. That judgment cannot be made here, since no evidence whatsoever in mitigation, or even argument, was presented. Although the state supreme court observed that Emerson "has not brought to our attention any mitigating evidence that should have been introduced for the jury's consideration," 522 N.E.2d at 1120, this was before the investigation by the mitigation specialist, and the state does not argue that Emerson's failure to conduct the investigation earlier should operate as a waiver of his claim.

We conclude that, in the unique circumstances of this case, Sammons' subminimum representation of Emerson at the sentencing hearing may have been responsible for the death sentence—not certainly of course, but with sufficient probability to establish a denial of the right to effective assistance of counsel at the sentencing phase. We therefore agree with the district court that Emerson's sentence of death must be set aside and a new sentencing hearing held.

AFFIRMED.

RIPPLE, *Circuit Judge*, concurring in part and dissenting in part.

I concur in my colleagues' decision that the petitioner received ineffective assistance of counsel at the sentencing stage of the state proceedings and that, consequently, the sentence of death imposed at those proceedings cannot stand. I respectfully differ with my colleagues as to whether the inadequate performance of counsel can be limited, as a conceptual or practical matter, to the sentencing procedure. This is not a case in which an otherwise acceptable professional performance was marred by a significant but singular breach at sentencing. Rather, in my view, the record discloses a performance that was substandard from the beginning and cannot be said to fulfill the constitutional mandate that a defendant have adequate counsel. *See Strickland v. Washington*, 466 U.S. 668 (1984).

A defense counsel has a two-fold obligation to the client. First, counsel must, after careful investigation, evaluation, and consultation with his client, formulate an adequate theory of defense. Second, counsel must execute that theory in the presentation of the accused's case. In this case, counsel formulated a theory of defense in only the most marginal of ways. Discarding without adequate investigation an alibi defense that, although certainly not air tight, had been respectable in the eyes of the state Supreme Court,[1] counsel adopted, again without adequate investiga-

[1] After the first trial, at which Mr. Emerson presented an alibi defense, the Supreme Court of Illinois reversed the judgment and remanded the cause for new trial on the ground of improperly admitted testimony and clearly improper, prejudicial statements by the State's Attorneys during final argument. The court concluded:

> The evidence of guilt consists solely of Ray's testimony. Defendant made no inculpatory statements, . . . no fingerprints were found, and there was no evidence that any of the proceeds of the robbery were in defendant's possession. Defendant denied any participation in the offense, and his testimony,

(Footnote continued on following page)

tion, a theory that depended on his convincing the jury that one of the victims had been the true perpetrator. This theory was, at best, only vaguely communicated to the jury and, due to the lack of preparation, it was supported by a mediocre cross-examination of the victim. This inadequate attempt to point the finger at a victim ended in a complete rout when, at the defendant's insistence, his brother was placed on the stand and gave an account that was completely at odds with the defendant's case. Even though counsel was not immediately responsible for the presentation of this witness, the impending disaster of counsel's chosen course certainly contributed to this abrupt change in course. In *United States v. Cronic*, 466 U.S. 648 (1984), the Supreme Court noted that counsel must act in the role of an advocate: "[I]f the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." 466 U.S. at 657-58. In Mr. Emerson's case, the confrontation that was displayed was one between the defendant and his counsel. In my view, his defense counsel's lack of pretrial investigation, lack of consultation with his client, and lack of preparation and strategy infected the trial from its inception and created a situation so prejudicial to Mr. Emerson that it resulted in Mr. Emerson's frustrated demonstrations. Defense counsel's performance fell below an "objective standard of reasonableness" that is based on "pre-

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[1] *continued*

if believed, would supply the motive for Ray's having charged him with the offense.

Where guilt or innocence depends entirely on the credibility of an accuser and the defendant, no error should be permitted to intervene. "Where error is shown to exist, it will compel reversal, unless the record affirmatively shows that the error was not prejudicial." Here, the record fails to show affirmatively that the improperly admitted testimony and the improper oral argument were not prejudicial. The judgment must therefore be reversed and the cause remanded . . . for new trial.

People v. Emerson, 455 N.E.2d 41, 47, 97 Ill. 2d 487, 502 (Ill. 1983).

vailing professional norms." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). His performance, especially the ill-considered rejection of the far stronger alibi defense, clearly rendered the result of the trial unreliable. *Lockhart v. Fretwell*, 113 S. Ct. 838, 844 (1993). Therefore, counsel's "salvage closing" to the jury, rather than being characterized as a redeeming performance, ought to be regarded, as a practical matter, as the result of counsel's having painted himself into a corner earlier.

Adequacy of counsel claims are often the last gasp of a near-defunct defense. Here, however, the record discloses, from beginning to end, a lack of care and preparation that resulted in a muddled presentation that the jury could only have found to be unconvincing. Although we ought not use the power of hindsight to second-guess the tactical decisions of counsel, neither ought we use that same power to construct theories of defense for a counsel whose lack of professional effort is clear from the pages of the record.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

App. 21

[Dated March 30, 1995]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA EX REL. DENNIS EMERSON,	)	
Petitioner,	)	
v.	)	Case No. 93 C 4650
RICHARD GRAMLEY, Warden, Pontiac Correctional Center,	)	
Respondent.	)	

MEMORANDUM OPINION AND ORDER

MARVIN E. ASPEN, District Judge:

Petitioner Dennis Emerson brings this petition for a writ habeas corpus pursuant to 28 U.S.C. § 2254. Emerson essentially raises three challenges to his conviction and sentence: (1) he was afforded ineffective assistance of counsel at the guilt-innocence phase of the trial, (2) he was afforded ineffective assistance of counsel at the sentencing phase of trial, and (3) he was sentenced under an unconstitutional sentencing scheme. For the reasons set forth below, his petition is granted in part and denied in part.

I. Background[1]

In his second trial a jury in the Circuit Court of Cook County convicted petitioner of murder, attempted murder, aggravated arson and two counts of armed robbery.[2] The same jury then imposed a sentence of death. Emerson appealed to Illinois Supreme Court, which reversed his conviction on the aggravated arson count but affirmed all other counts and affirmed his sentence of death. *People v. Emerson*, 522 N.E.2d 1109 (Ill. 1987), *cert. denied*, 488 U.S. 900 (1988). Emerson filed a petition for post-conviction relief, as well as a supplemental petition upon his retention of counsel, both of which were denied by the state trial court without a hearing. The

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[1] The findings of fact made by the state courts in Emerson's direct appeal and post-conviction proceeding are entitled to a presumption of accuracy. 28 U.S.C. § 2254(d). Petitioner asserts, however, that the findings of the Illinois Supreme Court on direct appeal are not entitled to such deference because they were not issued after an oral hearing with live testimony. The factual findings of state trial courts and appellate courts are entitled to the same presumption of accuracy. *See Sumner v. Mata*, 449 U.S. 539, 546-47 (1981); *Cuppett v. Duckworth*, 8 F.3d 1132, 1141 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1226 (1994). To be sure, as petitioner had no opportunity to raise facts outside the record in his direct appeal, we do not presume the accuracy of any purported "findings" on these issues. *See United States ex rel. Partee v. Lane*, 926 F.2d 694, 700 (7th Cir. 1991) ("state court must have made a finding on a particular issue before a federal court can defer to that finding"), *cert. denied*, 502 U.S. 1116 (1992); *see also* 28 U.S.C. § 2254(d)(3) (findings made without adequate factual development not preclusive).

[2] Petitioner's first conviction and death sentence were reversed on direct appeal. *People v. Emerson*, 455 N.E.2d 41 (Ill. 1983).

Illinois Supreme Court affirmed the denial of post-conviction relief, and the United States Supreme Court denied certiorari. *People v. Emerson*, 606 N.E.2d 1123 (Ill. 1992), *cert. denied*, 113 S. Ct. 1865 (1993). Emerson filed the instant petition on August 3, 1993.

The primary evidence at both of petitioner's trials was the testimony of Robert Ray, the co-owner of the Centaur Lounge in Chicago and an acquaintance of Emerson's for many years. He testified that he was working at the Lounge on August 12, 1979, and that Emerson called him numerous times that day to tell him he would be stopping by the bar. Ray testified that he closed the tavern at approximately 1:15 a.m., and that petitioner, accompanied by his brother Richard Jackson ("Jackson"), arrived some time later. The three men then went to Ray's apartment at the rear of the Lounge, where they were soon met by Ray's girlfriend, Delinda Byrd. Ray briefly left the group to buy some cigarettes from a store across the street, and then returned to the apartment.

Ray testified that as he was opening the package of cigarettes, Emerson pulled out a gun and ordered him and Byrd to lie on the floor. Petitioner then bound their hands and feet with some electrical cord he found in the apartment, and began pilfering the cash register in the tavern. After Ray told Emerson where he kept jewelry and guns in his apartment, petitioner gathered these items as well as any money Ray and Byrd had in their possession. While Emerson was collecting his booty, Jackson kept the gun on Ray and Byrd as they lay on the floor.

Ray then testified that Jackson and Emerson went into the kitchen, where Jackson picked up a half pair of scis-

sors and told petitioner to "use this." At this point, Emerson went over to the victims and stabbed them in the chest and back several times. Jackson and Emerson then started a fire in Ray's bedroom and threw Ray and Byrd in the flaming room. Ray testified that because he heard the door knob being rattled, he waited until the noise stopped before untying his hands and opening a window. He then fell out the window about eight feet into an airshaft between his building and the one next door. Ray claimed that Byrd also fell out of the window into the airshaft, and that he untied the remaining bindings on them. Ray then climbed back into the bedroom, but was unable to open the door. He crawled back into the airshaft and tried to enter the apartment through the kitchen window, but found the kitchen enveloped in smoke and flames. Finally, Ray entered a window leading into the Lounge and ran out the front door and summoned for help. Ray testified that he then ran back into the building, but was unable to extricate Byrd from the airshaft.

Firefighters later recovered Byrd's body from the airshaft, and medical testimony at trial established that she had been stabbed five times in the back, and had died from a combination of massive blood loss and extensive burns. Inside the apartment firefighters recovered lengths of electrical cord, the door knob and lock assembly to the bedroom door and a coat hanger found next to them. No scissors or shears were found in the apartment.

At one point during the State's case, outside the presence of the jury, Emerson expressed to the court his displeasure with the performance of his lawyer, Assistant Public Defender James Sammons. Trial Rec., Vol. III at

357.[3] Emerson also lamented that Sammons had not previously discussed trial strategy with him and resisted calling any witnesses. *Id.* at 359-60. After having his complaints rebuffed by the trial judge, Emerson declared that he would have nothing to do with the rest of the proceedings and would sit out the remainder of the trial in the back of the courtroom. *Id.* at 363-70.[4]

At the close of the State's case, Sammons indicated the he planned to rest without calling any witnesses. Trial Rec., Vol. III at 431. His client, however, demanded that certain witnesses be called in his defense. First, Emerson called his brother Ricky Jackson ("Ricky") to the stand and began to question him about Ray's possible motive for lying, but objections to his questions were sustained. Trail [sic] Rec. Vol. III at 437. Sammons then examined Ricky and elicited that he had been employed by Ray for a period of time before the alleged robbery. Sammons tried to inquire as to a possible motive for Ray to testify falsely, but his questions brought an objection from the State. *Id.* at 443. Outside the presence of the jury, Emer-

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[3] The record of proceedings in petitioner's first two trials is denoted as "Trial Rec., Vol #." The record during his post-conviction proceedings is abbreviated "P.C. Rec."

[4] The following is an example of Emerson's diatribes against Sammons and the proceedings:

> Mr. Emerson: Yeah, well, I'm stating for the record I think this man is incompetent. I don't want no parts to do with him. I'm going to sit this all out. You go ahead, do what you want to do because that's what you doing now, you know, almost like—you know, he just waiting for his role to come up. And then, do what he already told to do.

Trial Rec., Vol. III at 361.

son told the judge that he wanted to ask about a loan he had made to Ray, and establish that this loan was the reason for Ricky's employment. *Id.* at 444. Sammons told Emerson and the court that he had asked all the questions he would on the topic, since his inquiries had been ruled objectionable. *Id.* at 445.[5] The judge then explained to Emerson that Ricky could not testify as to what Ray or Emerson had told him; rather, Emerson would have to testify himself as to the existence of the alleged loan. When the jury returned, Sammons did not ask Ricky any further questions.

Emerson next directed Sammons to call his mother, Ms. Jessie Jackson, to the stand. However, Emerson refused to remain in the front of the courtroom during this examination. Rather, he insisted on sitting in the holding cell in the rear of the courtroom. When Ms. Jackson took the stand, Sammons indicated that he had no questions

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[5] Mr. Sammons: I understand your ruling, Judge. That's all I can tell you. That's just what I was trying to bring out and I asked all the questions I'm going to ask along those lines. This came out over my advice. You said you were going to let him ask questions and then, you stopped him from asking questions.

The Court: Because he's asking—

[Prosecutor]: He didn't ask questions.

Mr. Sammons: I, as a lawyer with a man's life in my hands, asked some questions I didn't want to ask in the first place. Now, you sustained the objections to those and that's about as far as I can take it.

Trial Rec., Vol. III at 445.

for her and she was asked to step down.[6]

Finally, petitioner requested that his brother (and co-defendant) Jackson be permitted to testify. At Emerson's direction, and over the protest of Jackson's attorney, Sammons asked Jackson if he had any further information as to the events of August 12-13, 1979. Jackson testified that on August 12 he had asked Emerson for a few hundred dollars, but Emerson had been unable to help him out. According to Jackson, Emerson then said that Ray owed him some money, and he offered to have Ray pay part of that debt to Jackson. Emerson called Ray to tell him that his brother was going to collect some of the money he owed him, and later on that day Jackson went to see Ray at the Centaur Lounge with a friend named Phillip Anderson. Jackson told the jury that at one point during the meeting Anderson realized "this [was] not what he come for," and pulled a gun on Ray. Trial Rec.,

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[6] Mr: Sammons: I didn't ask to call this lady. He did.

The Court: Pardon me?

Mr Sammons: I didn't ask to call this lady.

The Court: You want to conference with your attorney for a second?

Mr. Sammons: I have conferred all I want to, Judge.

Mr. Emerson: Yes. Your Honor—

[Prosecutor]: Judge, we'd object at this point. We'd ask the jury be excused.

The Court: Objection sustained.

Mr. Emerson: I know the jury is prejudiced against me already. I know that. It's a conspiracy.

The Court: Mr. Emerson, be seated.

Trial Rec., Vol. III. at 449.

Vol. III at 453-57. Soon afterwards Ray's girlfriend entered the apartment, and Jackson and Anderson proceeded to tied [sic] them up, stab them, set the apartment on fire, and lock them in the flaming room. On cross-examination, Jackson admitted that he never told this story to anyone else before that day.

Sammons rested for the defense after Jackson's testimony. In closing argument the prosecution stressed the veracity of Ray's testimony as well as the fact that it was essentially corroborated by Jackson. Sammons then made the following closing argument:

> Ladies and gentlemen, this case has become bizarre, in and out. A state of confusion during this trial as I suppose you can tell due to the fact that my client and I have disagreement-disagreements about how this case should be tried. And, of course, as you heard, the testimony of his brother that you heard a few moments ago was something no one heard, including myself and his own lawyer until the time he took the stand and gave it. But as long as this man's life is in my hands, I'm going to do my best to save his life.
>
> I can still look you in the eye with all this evidence and say this. That I don't believe that two people went into that place that night with the idea to commit an armed robbery. And there's a difference between just a simple murder and felony murder. I know it sounds terrible, but in our law, there's a difference between when a man commits murder and when a man commits murder in the course of a felony.
>
> . . . .
>
> If you have any doubts about the counts of armed robbery which will be submitted to you in this case

> with respect to Dennis Emerson, please, at this point, find him not guilty of armed robbery. It does make a difference. And as I say, I don't think two men planning to go into a saloon, a tavern in this particular area and planning to commit a robbery, planning to take the weekend proceeds—
>
> [Prosecutor]: I'm going to object at this point. Whether they planned it or not is not relevant. The fact they did it or not is relevant.
>
> The Court: Overruled. I'll instruct the jury as to the law.
>
> Mr. Sammons: In planning to murder the witnesses so there would be no witnesses to it, you never call up and announce their arrival. Would never allow this man to leave, go out and get cigarettes. That's all I'm saying. If this was a murder, it was a murder. If there is a reasonable doubt that this was a murder committed in the course of a forcible felony or armed robbery, I'm asking you to so indicate by signing verdict forms of not guilty with respect to these armed robbery counts. And that's all I'm asking you. Thank you.

Trial Rec., Vol. III at 477-79.[7] In rebuttal the prosecution again attacked Jackson's credibility and stressed that Ray's testimony was believable.

After the jury found Emerson guilty of murder, attempted murder and aggravated arson, Sammons moved for a mistrial but this motion was denied without argu-

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[7] Emerson claims in his affidavit that Sammons intended to waive closing argument, and that he only made the preceding statement at Emerson's insistence. P.C. Rec., Supp., Tab 1, ¶ 9. In his deposition some nine years after the trial, Sammons could not remember whether he discussed closing argument with Emerson. Sammons Dep. at 292-93.

ment. The State then moved for a death penalty hearing, which was held the following day. Sammons submitted the issue of eligibility to the jury without evidence or argument, and the jury found Emerson death eligible.

The aggravation-mitigation phase of sentencing then began. Although the prosecution made an opening statement, Sammons declined to do so. Further, Sammons asked only one question during cross-examination of the state's witnesses. Trial Rec. Vol. III at 552-80.[8] At the close of the prosecution's evidence, Sammons stated "my client wishes me to present no evidence, make no argument and wishes to remain in the back." *Id.* at 584. At the prompting of the prosecutor, the judge brought Emerson up from the back of the courtroom and conducted the following inquiry:

> The Court: All right. Mr. Emerson, you have heard what your attorney just said, that you basically have no evidence to presen[t] in mitigation. And you have no witnesses and you do not wish to be out here, is that correct, sir?
>
> Mr. Emerson: (nodding)
>
> The Court: Did you hear that in the back?
>
> Mr. Emerson: No. I was listening.
>
> The Court: Pardon me?
>
> Mr. Emerson: I wasn't listening.
>
> The Court: Is the speaker on in the back if you want to listen?

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[8] Sammons did object to certain exhibits being returned to the jury room, as well as the form of the stipulation read to the jury regarding Emerson's prior convictions. *Id.* at 581-82.

Mr. Emerson: Yeah, it's on.

The Court: Okay. Fine, sir. So, you don't want to present any evidence, is that correct sir? You have the right to present any evidence, is that correct sir?

Mr. Emerson: I don't want to.

The Court: Okay. Fine, sir. You wish to remain in the back as opposed to sitting in the courtroom?

Mr. Emerson: Yeah.

Trial Rec., Vol. III at 584-85. The state then read stipulations to the jury and made its closing argument, and Sammons submitted the case to the jury without argument. *Id.* at 585-92. The jury returned that same day with a sentence of death. *Id.* at 603.

II. Discussion

Petitioner contends that his trial and sentencing were conducted in violation of the federal constitution, requiring us to overturn his conviction and sentence of death. First, he argues that Sammons provided him ineffective assistance of counsel at both the guilt-innocence phase and the sentencing phase of the trial in violation of his Sixth and Fourteenth Amendment rights. Second, he contends that he was sentenced under a statute that breaches the guarantees of the Sixth, Eighth and Fourteenth Amendments.

A. Exhaustion and Default

At the outset, we must consider whether Emerson has exhausted his state court remedies and not procedurally

defaulted any of his claims.[9] The exhaustion requirement of 28 U.S.C. § 2254 requires habeas petitioners to seek vindication of their federal constitutional rights in the courts of the various states before requesting relief in the federal system. *Engle v. Isaac*, 456 U.S. 107, 125-26 n.28 (1982). Thus, a petitioner must present his federal claims to the highest available state court, or no longer be able to present them in the state system, in order to satisfy the exhaustion requirement. *See Resnover v. Pearson*, 965 F.2d 1453, 1458 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 2935 (1993). In contrast, procedural default occurs when a petitioner's claims are rejected by a state court pursuant to an independent and adequate state procedural rule. *Coleman v. Thompson*, 111 S. Ct. 2546, 2554 (1991). Generally, this occurs where the petitioner, although pursuing all appeals required by state law, fails to raise a federal constitutional issue in state court, *Resnover*, 965 F.2d at 1458-59, or where he fails to pursue his state appeals and the state court to which he would present his claim would find it procedurally barred. *Coleman*, 111 S. Ct. at 2257 n.1; *Jenkins v. Gramley*, 8 F.3d 505, 507-08 (7th Cir. 1993). Where a federal claim is procedural[ly] defaulted pursuant to an independent and adequate state rule, "federal habeas review of the claim[ ] is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a

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[9] Although these two concepts are conceptually distinct, they are often confused by litigators and judges. *See United States ex ref. Sumner v. Washington*, 840 F. Supp. 562, 568 (N.D. Ill. 1993).

fundamental miscarriage of justice." *Coleman*, 111 S. Ct. at 2565; *see also Wainwright v. Sykes*, 433 U.S. 72 (1977).

Respondent concedes that Emerson has exhausted his state court remedies, so we need only address the question of procedural default. The State contends that petitioner failed to raise on direct appeal in the state court the following objections to Sammons's performance during the guilt-innocence phase of his trial: 1) Sammons's failure to make an opening statement, (2) his cross examination of Ray, (3) his failure to have Emerson testify, and (4) his failure to object to the improper cross-examination of defense witnesses.[10] Only if these claims were "fairly presented" to the state courts—i.e., petitioner proffered both the underlying factual basis and the federal theory supporting each claim—can Emerson avoid procedural default. *See Picard v. Connor*, 404 U.S. 270, 275-76 (1971). The first three of these claims were first presented to the Illinois courts in Emerson's post-conviction petition, and the fourth was only raised in his § 2254 petition. Under Illinois law a claim that could have been raised on direct appeal but was not is waived and is not subject to review in subsequent direct or collateral review, *People v. Barnard*, 470 N.E.2d 1005, 1008 (Ill. 1984), unless disposition of the issue would require the consideration of matters outside the record.

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[10] Respondent also maintains that Emerson failed to raise the argument that Sammons expressed disbelief in Jackson's testimony before the jury. However, this issue was raised on direct appeal, Pet. App. Br. at 30, and did [not] have to be raised again in Emerson's post-conviction petition as it would have been barred by the doctrine of res judicata. *See Reese v. Peters*, 926 F.2d 668, 670 (7th Cir. 1991).

See People v. Morris, 593 N.E.2d 932, 947 (Ill. App. Ct. 1992) (post-conviction petition may contain issues outside record), *app. denied*, 602 N.E.2d 468 (Ill. 1992). In Emerson's appeal of the denial of his post-conviction petition, the Illinois Supreme Court held that petitioner was barred from relitigating the effective assistance of counsel claims that he raised on direct appeal. Further, the court held that Emerson could not simply raise "additional factors supporting his claim" in his post-conviction petition, since those matters could have been raised on direct appeal. *People v. Emerson*, 606 N.E.2d 1123, 1126 (Ill. 1992); *see People v. Albanese*, 531 N.E.2d 17, 19 (Ill. 1988), *cert. denied*, 490 U.S. 1075 (1989)."[11] Because each of these alleged errors would have been evident from the trial transcript, Emerson cannot contend that matters outside the record need to be considered in order to determine the constitutionality of Sammons's performance.[12] As petitioner has neither alleged cause for failing to raise these issues nor any prejudice arising therefrom, he is barred from presenting them in his § 2254 petition.

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[11] Because the Illinois Supreme Court's opinion disposing of Emerson's post-conviction appeal did not fairly appear either to rest primarily on federal law, or to be interwoven with federal law, we need not decide whether the court "clearly and expressly rel[ied] on an independent and adequate state ground" in disposing of these claims. *See Coleman*, 111 S. Ct. at 2557.

[12] Petitioner argues that only by comparing the performance of counsel in the first trial with Sammon's performance at the second trial can the issue of adequacy be properly examined. We disagree. The adequacy of trial counsel must be evaluated with regard to the circumstances of the specific trial at issue, not in comparison to other trials. *See Strickland v. Washington*, 466 U.S. 668, 690 (1984).

B. Ineffective Assistance at Trial

The Sixth Amendment, as applied to the states through the Fourteenth Amendment, guarantees criminal defendants the right to the effective assistance of counsel at trial. *Strickland v. Washington*, 466 U.S. 668, 685 (1984). In order to prevail on his ineffective assistance of counsel claim petitioner must demonstrate that Sammons's performance fell below an objective standard of reasonably effective representation, *id.* at 687-88, and that he was prejudiced by this ineffectiveness. *See Lockhart v. Fretwell*, 113 S. Ct. 838, 842 (1993) (prejudice must be so great as to render the proceeding "fundamentally unfair or unreliable"). "[F]ailure to establish either one of the two components is fatal [to] the claim." *United States v. Slaughter*, 900 F.2d 1119, 1124 (7th Cir. 1990). In analyzing claims of ineffectiveness, we must engage in the strong presumption that counsel's performance fell within the range of professional competence and that the original verdict was reliable. *United States ex rel. Partee v. Lane*, 926 F.2d 694, 700-01 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1230 (1992).

Emerson argues that his attorney's actions at trial fell below Sixth Amendment standards in that (1) he failed to sufficiently interview and consult with Emerson prior to trial, (2) he neglected to investigate and prepare witnesses in Emerson's defense, (3) he failed to develop a coherent theory of defense, (4) he conceded Emerson's guilt during closing argument, (5) he failed to object to the State's closing argument, and (6) he demonstrated antagonism towards Emerson throughout the trial.

1. Failure to Interview/Consult with Emerson

Petitioner contends that prior to his second trial he only met with Sammons for forty-five to ninety minutes on February 19, 1985. Sammons believes that he also met with Emerson in a joint session with co-defendant Jackson and his attorney on or about February 26, 1985. Apart from these two meetings, and pretrial proceedings on the record, neither Sammons nor Emerson has any recollection of speaking with each other about the case. Petitioner argues that by failing to sufficiently interview his client and consult with him about the strategy to be employed at trial, Sammons was unable to effectively defend him at trial.

Respondent argues that no minimum number of meetings is required in order for counsel to provide reasonably effective representation. *See United States v. Olson*, 846 F.2d 1103, 1108 (7th Cir.), *cert. denied*, 488 U.S. 850 (1988). A well-seasoned attorney "can get more out of one interview with a client than a neophyte lawyer," *United States ex rel. Kleba v. McGinnis*, 796 F.2d 947, 954 (7th Cir. 1986), and thus a large number of encounters need not be undertaken in order for counsel to competently defend a client. *See United States v. Olson*, 846 F.2d 1103, 1108 (7th Cir. 1988) (experienced attorney not ineffective by meeting with client only twice prior to trial); *Schwander v. Blackburn*, 750 F.2d 494, 499-500 (5th Cir. 1985) (failure to meet with client until date of trial not ineffective assistance).

While we do not applaud Sammons's decision to meet with Emerson on only one or two occasions, given the circumstances of the case and the availability of the transcript of the first trial, we cannot conclude that his

performance fell below the constitutional standard. Sammons's began his representation of Emerson on February 19, 1985, after petitioner's original counsel—who had been appointed one year earlier—withdrew due to serious differences with his client over trial strategy. Prior to the start of trial on March 25, 1985, Sammons met with Emerson for at least forty-five to ninety minutes. Moreover, Sammons was able to evaluate Emerson's potential testimony by reviewing the transcript of the first trial. The case did not present any complex issues of fact or law, nor would Emerson's testimony have been difficult for Sammons's to direct had he taken the stand. Absent any indication that the case required extensive discussions between Emerson and Sammons, we decline to hold that a forty-five to ninety minute meeting between a defendant and his lawyer fails to satisfy the requirements of the Sixth Amendment.[13]

Further, petitioner has failed to "affirmatively prove prejudice" resulting from his infrequent contact with

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[13] Petitioner points us to *Griffin v. Warden, Maryland Correctional Adjustment Center*, 970 F.2d 1355, 1356-58 (4th Cir. 1992), for support of his contention that Sammons was deficient. However, defense counsel in *Griffin* performed no investigation prior to trial, failed to notify prosecutors of possible alibi witnesses (as required by rule), and failed to secure the presence of such witnesses in court, all because he thought the defendant would plead guilty on the day of trial. Because counsel offered no reasonable excuse for failing to notify the state of alibi witnesses and bringing them to court, the Fourth Circuit found his performance constitutionally deficient. Not only does this Case not address the issue of pretrial contact with the defendant, it differs from the case at bar in that Sammons did prepare the case and did inform the prosecutor of potential alibi witnesses, but simply chose not to utilize them in Emerson's defense. Trial Rec., Vol. III at 91.

Sammons. *Strickland*, 466 U.S. at 693. Emerson argues that because Sammons did not discuss with him the nature and value of potential alibi witnesses, counsel was unable to develop a coherent theory of defense. However, petitioner's argument relies on the fallacious underlying assumption that an alibi defense was the only viable means of avoiding a conviction. Rather, as we discuss below, Sammons's conduct at trial was consistent with a plausible theory of the case which did not depend on alibis. Although every defendant might want greater contact with his or her lawyer, there is no indication here that Emerson was prejudiced by his limited interaction with Sammons. *See United States v. Soto-Alvarez*, 958 F.2d 473, 478 (1st Cir.) ("Though defendant's meetings with counsel may have been short, he fails to establish how the short length of his meetings with his attorney before trial affected his attorney's performance during trial."), *cert. denied*, 113 S. Ct. 221 (1992). Accordingly, we deny petitioner's claim based on infrequent discussions with his lawyer.

2. Failure to Interview or Prepare Alibi Defense

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Montgomery v. Petersen*, 846 F.2d 407, 412 (7th Cir. 1988) (quoting *Strickland*, 466 U.S. at 690-91); *United States ex rel. Williams v. Washington*, 863 F. Supp. 697, 704 (N.D. Ill. 1994). Although counsel need not investigate every conceivable avenue of defense, potential witnesses must be contacted unless the attorney makes a rational decision not to conduct what he believes to be unnecessary investigation. *Montgomery*, 846 F.2d at 413.

Emerson maintains that Sammons did not conduct an adequate investigation into his potential alibi defense. He claims that by not speaking with the attorneys who represented him at his first trial, discussing the case only briefly with his prior counsel in the second trial, and failing to interview Emerson's mother and ex-wife as potential alibi witnesses,[14] Sammons provided constitutionally deficient assistance. We disagree. In preparing for trial Sammons reviewed the transcript of the first trial, as well as the Illinois Supreme Court opinion reversing Emerson's first conviction. In speaking with Emerson's first attorney in the retrial, Sammons learned that no new witnesses or evidence would be introduced, and his own investigation of the record revealed that no new information would need to be presented.[15] He was aware of the testimony that could be developed at the second trial by the State's witnesses, as well as Emerson's, and could evaluate potential avenues for impeachment.

Furthermore, as discussed more fully below, Sammons's theory of the case did not entail the presentation

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[14] Emerson also argues that his aunt could have provided alibi testimony for him, but this claim was not presented in either his direct appeal or his post-conviction petition. As petitioner has failed to demonstrate cause and prejudice with regard to this issue, it is procedurally defaulted. *See Resnover*, 965 F.2d at 1458-59.

[15] We note that Emerson's first conviction was reversed because of the introduction of improper evidence, not because the case against him was somehow defective. Consequently, there was no reason for Sammons to believe that he needed to look outside the trial transcript in order to prepare the case effectively.

of the alibi defense that Emerson contends should have been presented. Rather, Sammons's theory revolved around discrediting Ray's testimony and suggesting that Ray had committed the crime. Sammons's decision not to interview the witnesses Emerson now claims were essential to his case was not irrational, since he reasonably chose not to pursue an alibi defense and therefore had no need to interview them. Nor are we presented with a case like *Montgomery*, 846 F.2d at 413-14, where counsel failed to call the only disinterested alibi witness available to the defendant. In the instant case, the only witnesses Emerson contends should have been called were his mother and his ex-wife, patently interested witnesses of little value to the case. In sum, we cannot conclude that the failure to investigate and prepare two interested alibi witnesses, who were not essential to the defendant's theory of defense, constituted ineffective assistance.

Moreover, even if Sammons was deficient, Emerson has failed to demonstrate that he suffered any prejudice. With regard to his ex-wife, Emerson has not submitted any evidence indicating what her testimony would have been. Nor can we glean what she would have said from the transcript of the first trial, since she did not testify. As petitioner has failed to demonstrate that his ex-wife would have provided any meaningful evidence on his behalf, he cannot demonstrate prejudice from failing to call her. *See United States v. Rodgers*, 755 F.2d 533, 541 (7th Cir.), *cert. denied*, 473 U.S. 907 (1985)

As to any potential testimony his mother may have given, Emerson has inadequately demonstrated that she would have provided a viable alibi defense. Ms. Jackson stated in an affidavit submitted with Emerson's petition

for post-conviction relief that "during the night of Sunday, August 12, 1979, and the early morning hours of Monday, August 13, 1979, my son Dennis Emerson was at my home (6715 South Sangamon Avenue, Chicago, Illinois) until approximately 3:30 a.m." P.C. Rec., Supp., Tab 3, ¶ 2. However, this testimony has several serious problems. First, the attack on Ray occurred sometime just prior to 4:00 a.m. on August 13, 1979; thus, Ms. Jackson's claim that Emerson was at her house until 3:30 a.m. would not preclude him from being the attacker. Second, the credibility of this testimony is seriously undermined by the fact that Ms. Jackson is petitioner's mother. Third, Emerson testified at the first trial that everyone in the house was asleep after midnight, suggesting that Ms. Jackson would have no idea of when Emerson actually left. Considering these defects, we find that the failure to present the proffered testimony of Ms. Jackson during the guilt-innocence phase of trial did not prejudice petitioner.

Emerson also points to the absence of any written notes in his case file from the Public Defender's Office as proof that Sammons did not prepare the case. Sammons claims that he did prepare such notes, which outlined the examinations he would conduct and the testimony of the witnesses, but that they somehow must have been lost in the time since the trial. Emerson has not directly attacked this assertion, but merely suggests that because Sammons's regular practice was to take written notes and leave them in the file, the failure to find such notes indicates that he did not follow this regular practice in his case. However, the underlying premise of his argument—that Sammons always made notes and prepared for his cases—also weighs in favor of the opposite con-

clusion that Sammons did indeed make such notes and their absence is simply an unfortunate occurrence. Regardless, even if no notes were made, at worst this demonstrates that Sammons did not use hand-written notes when preparing his examinations. Not only does this appear reasonable given that Sammons had the transcript of the previous trial, but we are unaware of any case holding that the failure of an attorney to use written notes constituted ineffective assistance. As petitioner has failed to demonstrate deficient performance or prejudice stemming from Sammons's activities in preparing the case, this claim is denied.

3. Theory of Defense

Petitioner contends that Sammons failed to develop a coherent theory of defense, and that even if he had such a theory, it was inadequately advanced before the jury. Counsel's creation of a theory of the case is not grounds for a finding of ineffectiveness so long as the decision was rational and based on adequate investigation. *See Strickland*, 466 U.S. at 690-91. Moreover, counsel's performance should not be analyzed though [sic] the lens of hindsight, since every convicted felon might then have a persuasive argument of inadequate representation. *See id.* at 689. So long as counsel's performance was consistent with a rational theory of defense at the time of trial, we will not find it inadequate.

Respondent maintains that Sammons's theory centered around suggesting that Ray was actually responsible for

the crime.[16] The State claims that Sammons sought to persuade the jury (1) that Ray was not credible, (2) that Ray was conducting illegal activities in the Centaur Lounge on the night of August 12-13, and (3) that he did not help Byrd escape from the burning building. In his cross-examination, Sammons tried to elicit from Ray (with varying degrees of success) that he had a fractious relationship with Byrd, that he did not help her stop the bleeding from her wounds, and that he failed to assist her out of either the burning building or the airshaft. Sammons also highlighted Ray's claim that Emerson told Ray several times that day he would be coming over to the Lounge, and suggested that such behavior was inconsistent with that of a man intending to commit a murder. To be sure, Sammons did not obtain all of the admissions that he hoped to extract out of Ray and the other witnesses. For example, although Sammons suggested by his questioning that Ray did not try to save Byrd, Ray testified that he did help untie the electrical cord that bound her hands. Nonetheless, Sammons conducted the trial in a manner consistent with his asserted theory of defense, and its presentation to the jury was not so inept as to amount to constitutional error.

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[16] We are hampered in determining whether this indeed was Sammons's theory by a number of factors. First, as we discuss in detail below, counsel's closing argument was marred by problematic testimony presented at the insistence of Emerson. Second, the passing of some fifteen years between the trial and discovery in the instant matter has clouded the memories of the participants. Third, the absence of either preparatory or trial notes by Sammons prevents us from recreating his mental processes. Nonetheless, counsel's performance in the courtroom and his statements made in resolving Emerson's post-conviction petition are sufficient for us to discern a viable theory.

Emerson also challenges his lawyer's decision not to present an alibi defense. At the outset we observe that Emerson did not present this defense at his first trial, but rather, tried to show that because Ray owed him $5000, he had a motive to falsely accuse Emerson of the crime. At the second trial, Sammons did not present a defense that involved either this prior loan or potential alibi testimony, except to the extent it was forced upon him by Emerson's insistence at calling his mother and brothers to the stand. In general, counsel's decision not to present a particular theory of the case does not amount to ineffective assistance. *United States v. Muehlbauer*, 892 F.2d 664, 668-89 (7th Cir. 1990); *United States ex ref. Jones v. Washington*, 836 F. Supp. 502, 509 (N.D. Ill. 1993), *aff'd*, 32 F.3d 570 (7th Cir. 1994); cf. *United States v. Loscalzo*, 18 F.3d 374, 385 (7th Cir. 1994) ("the decision not to call a witness is a tactical choice which is not subject to review"). While it is true that counsel's failure to present the only available defense can violate the Sixth Amendment, *Keys v. Duckworth*, 761 F.2d 390, 392 (7th Cir. 1985), if the particular theory chosen by counsel is reasonable given the amount of investigation he performed, then we will not find his performance constitutionally defective. *See Strickland*, 466 U.S. at 690-91.

Although the theory presented in the instant case was not particularly robust, it was not unreasonable to pursue this course rather than the unattractive alternatives. Emerson's alibi defense was based solely on the testimony of interested family members, whose statements contained significant inconsistencies with each other and

with the facts adduced at trial.[17] This sort of alibi is not the type of "slam-dunk" defense that should always be presented to the jury. Cf. *Harris v. Reed*, 894 F.2d 871, 877-79 (7th Cir. 1990) (failure to call two unbiased, credible witnesses who saw another man running from crime scene, after such evidence was previewed to jury, was unreasonable); *Sullivan v. Fairman*, 819 F.2d 1382, 1391-93 (7th Cir. 1987) (failure to present credible exculpatory evidence from disinterested witnesses was unreasonable). The "loan" defense also had critical factual problems. The funds allegedly loaned to Ray were obtained from a bank robbery Emerson committed, and the loan was supposedly made at a time when Emerson was in custody on another offense. Moreover, testimony about the loan could only be introduced by having Emerson himself take the stand. Given these factual problems, the close relationship between Emerson and his potential

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[17] At his first trial Emerson testified that he was at home with his mother, sister, and two brothers on the night of August 12-13, 1979, and that they were all asleep before midnight. He also testified that he spent part of the night at his ex-wife's house, first claiming that he left his home between 4:00 a.m. and 5:00 a.m., then stating that he left about 3:30 a.m. or 4:00 a.m.

In contrast, Ricky Jackson testified at the first trial that he was not at his mother's house that night, but spent the evening at his girlfriend's apartment. Although Ms. Jackson asserts in her affidavit that Emerson was home until 3:30 a.m. on the morning of August 13, Emerson himself testified that she was asleep and thus would have no persona[l] knowledge of his departure time. Finally, Officer Griffen testified that he found no males present in Ms. Jackson's house when he searched soon after responding to the fire at Ray's apartment. These inconsistencies seriously undermined the viability of Emerson's alibi defense.

alibi witnesses, and the weakness of their proffered testimony, it was not unreasonable for Sammons to avoid these defenses.[18] *Cf. Johnson v. Lockhart*, 921 F.2d 796, 799 (8th Cir. 1990) (decision not to call alibi witnesses of questionable credibility was matter of trial strategy). Accordingly, we decline to find Sammons's choice of theory to amount to constitutional error.

4. Closing Argument

Petitioner maintains that in closing argument Sammons conceded Emerson's guilt to the jury, thereby violating his duty to provide effective assistance consistent with his client's plea of not guilty. At the outset, we observe that Sammons's closing argument must be evaluated in the context of the trial. Although Sammons spent much of the trial attempting to discredit Ray's testimony and suggest that he was actually responsible for the murder of Byrd, at Emerson's insistence Richard Jackson took the stand. Emerson's brother then corroborated Ray's testimony in almost every relevant respect, thereby eviscerating much of Sammons's theory. The only difference between Jackson's testimony and Ray's was that Jackson claimed that Phillip Anderson, and not Dennis Emerson, accompanied him to the apartment that

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[18] Moreover, this is not a case where counsel failed to present the only plausible defense available to the defendant. *See, e.g.*, *Sanders v. Ratelle*, 21 F.3d 1446, 1459 (9th Cir. 1994) (counsel failed to base defense on mistaken identity and declined to present confession of another person); *United States v. Kladouris*, 739 F. Supp. 1221, 1228 (N.D. Ill. 1990) (counsel failed to present only available defense of justification). Rather, counsel conducted the trial consistent with the theory that Ray was actually responsible for Byrd's death.

night. This testimony had never been disclosed to anyone prior to the second trial, and contradicted Jackson's own defense, thereby placing Sammons in a difficult position when explaining this evidence in his closing argument. Moreover, in order to maintain some credibility with the jury, Sammons was required to acknowledge the obvious differences between his trial strategy and that proposed by his client.[19] Consequently, his statements that the trial had become "bizarre" and that he and Emerson had some disagreements were merely attempts to gain credibility before the jury, and did not impair his client's plea of not guilty.

The remainder of counsel's remarks in closing are more problematic. It is true that an attorney cannot admit his client's guilt without first obtaining his consent. *See United States v. Simone*, 931 F.2d 1186, 1196 (7th Cir.), *cert. denied*, 502 U.S. 981 (1991). However, it is not necessarily error for counsel to admit that the evidence against his client on a particular count is overwhelming. *See Underwood v. Clark*, 939 F.2d 473, 474 (7th Cir. 1991) (counsel permitted to acknowledge abundance of evidence against client on lesser count when doing so would highlight absence of evidence on more serious count). Counsel's recognition of evidence against his client, so long [as] it is part of a rational trial strategy, will not be considered ineffective assistance, even if the client is not consulted. *Id.*

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[19] Indeed, Sammons was forced to conduct much of the trial without the presence of his client at counsel's table, because Emerson refused to participate in the proceedings and insisted on viewing the trial from the holding area in the rear of the Courtroom. Such conduct certainly hampered Sammons's ability to make an effective presentation to the jury.

Sammons argued in closing that the facts did not support the State's contention that the two people who entered Ray's apartment that night intended to commit armed robbery. He focused on Ray's testimony that Emerson had told him on the night of the murder that he would meet him at the saloon, and that Emerson supposedly permitted Ray to leave the tavern and get some cigarettes. Sammons then asked the jury to return a verdict of not guilty with regard to the armed robbery counts, saying "[i]f this was a murder, it was a murder." He concluded his argument by saying that all he was asking the jury to do was find Emerson not guilty of armed robbery. Emerson contends that these remarks effectively undermined his plea of not guilty to the murder charge against him.

Given the problematic situation in which Sammons was placed by the actions of his client, and the remarkable evidence which was presented by Jackson, we conclude that Sammons conducted his closing argument according to the professional dictates of the Sixth Amendment. Counsel's original theory—that Ray had concocted the entire story—was seriously undermined by Jackson's testimony, since the vast majority of Ray's testimony was corroborated by Jackson. While Sammons could have argued that Jackson's testimony showed that Ray incorrectly identified Emerson, it would have required Sammons to credit portions of Ray's testimony at the same time he was discrediting others. Emerson maintains that Sammons could have stressed the lack of fingerprints connecting him to the crime, but this would not have been persuasive since much of the building had been destroyed by the fire. Instead, Sammons focused on the armed robbery charge in the hope of effecting Emerson's

eligibility for the death penalty. As noted by the Illinois Supreme Court on direct appeal, this theory was not perfect, since the underlying felony need not have been be completed, proven or even charged by the government in order for a defendant to be found guilty of felony murder. *See People v. Emerson*, 552 N.E.2d 1109, 1117 (Ill. 1987) (quoting *People v. Walker*, 440 N.E.2d 83, 88 (Ill. 1982)). However, had Sammons been able to persuade the jury to acquit Emerson of armed robbery, he could have defeated the felony murder charge and a potential death sentence. *See People v. Harris*, 547 N.E.2d 1241, 1252 (Ill. 1989), *cert. denied*, 496 U.S. 908 (1990). Sammons's comment on the evidence dealing with the murder charge was therefore rational, given that such evidence overwhelmingly pointed to Emerson as the attacker and Sammons was trying to save his client from the death penalty.[20] To be sure, Sammons's closing was not particularly persuasive, since he only chose to challenge the State's contention that Emerson went to the Lounge with the intent to commit armed robbery. However, due to the damning evidence given by Ray, the physical evidence supporting his version of the events, and Jackson's corroboration of most of it, Sammons did not have much room in which to maneuver. While not an optimal presentation, Sammons's closing was rational given the evidence presented at trial and Emerson's po-

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[20] The instant case does not exactly parallel *Underwood*, as Sammons was arguing for acquittal on the lesser charge rather than the more severe one. Nonetheless, the reasoning of *Underwood* applies here because counsel sought to contrast the evidence which existed on the murder count with the conflicting evidence on the armed robbery count in order to reduce Emerson's exposure to the more severe penalty.

tential penalty, and therefore did not constitute deficient performance.

Additionally, Emerson has failed to demonstrate prejudice resulting from this closing argument. In order to succeed on his claim petitioner must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; *see also Lockhart v. Fretwell*, 113 S. Ct. 838, 842 (1993) (proceeding must be fundamentally unfair or unreliable to amount to prejudice). In this case, any other closing that Sammons could have made would not have sheltered his client from the thoroughly damning evidence against him. Although petitioner claims that he was only implicated because of Ray's biased testimony, this testimony was corroborated by both physical evidence (e.g., Byrd's body was found in the airshaft, the door locking mechanism [was] found just as Ray had described it, etc.) and Emerson's own witness.

Emerson also contends that because the evidence at the first trial was so close as to require reversal upon the finding of certain minor trial errors, the evidence at the second trial must also have been near equilibrium. Not so. At his first trial Emerson himself testified that he was not at the Lounge on the night in question, while in the second trial only his brother testified as to petitioner's absence. Given that Emerson did not take the stand in the second trial, and thus Ray's testimony was only challenged [by] the dubious testimony Jackson gave (after the State had rested in its case against him), the evidence facing Emerson at his second trial was much stronger than at the first. In sum, we do not find that

the evidence at the second trial was so close as to render Sammons's closing argument prejudicial.

5. Failure to Object to State's Closing

Petitioner claims that Sammons was also deficient in failing to object to the State's closing argument and its rebuttal. In general, the decision of whether to object to a prosecutor's closing argument is considered a matter of trial strategy. See *United States v. Driver*, 798 F.2d 248, 255 (7th Cir. 1986). Only where the evidence is obviously objectionable and thoroughly inculpating have courts based a finding of ineffectiveness on a failure to object. *See, e.g., Bolander v. Iowa*, 978 F.2d 1079, 1083 (8th Cir. 1992). In the instant case, closing argument by the state's attorney did not violate the ethical rule against offering a personal belief or opinion on testimony, *see* ABA Rules of Professional Conduct 3.4(e); ABA Standards for Criminal Justice 3-5.8(b), but rather, sought to point out the strengths and weaknesses in the credibility of the various witnesses. In the context of his entire argument the prosecutor's contention that Jackson's testimony was a "bizarre sham" bordering on perjury, was nothing more than argument as to why the State's version should be believed. As the prosecutor did not interject personal opinion, there would have been no grounds for Sammons to object. Moreover, Emerson has failed to demonstrate any prejudice resulting from this alleged error. Accordingly, this claim is denied.

6. Miscellaneous Errors

Emerson also makes two additional arguments as to why Sammons provided deficient assistance. First, he claims that Sammons demonstrated antagonism towards

his client when Ms. Jackson was called to the stand, as well as during his closing argument. While these two instances did indicate to the jury that friction existed between Emerson and his lawyer, they were not so serious as to implicate the Sixth Amendment. Indeed, Sammons's statement during closing argument was apparently intended to establish some credibility with the jury, and was therefore a rational matter of trial strategy.

Second, petitioner contends that the cumulative effect of all of Sammons's trial errors was to deprive him of effective assistance. While it is true that a collection of harmless errors, when considered in concert, may nonetheless amount to a violation of the Sixth Amendment, *see Kubat v. Thieret*, 867 F.2d 351, 357 (7th Cir.), *cert. denied*, 493 U.S. 874 (1989); *United States v. Kladouris*, 739 F. Supp. 1221, 1230 (N.D. Ill. 1990), we are not faced with such a scenario. Rather, counsel in the instant case had available the transcript from the first trial to assess possible theories and witnesses; no additional evidence was to be presented by the State; Emerson was not going to testify, thereby preventing the State from inquiring into the circumstances of his arrest; and Emerson's brother presented incredible testimony that had never been previously presented and contradicted his own defense. In evaluating Sammons's conduct in the context of these events, we cannot conclude that the combined effect of his performance was to deprive petitioner of his constitutional rights.

In sum, petitioner has failed to satisfy his heavy burden of demonstrating that Sammons provided him with ineffective assistance during the guilt-innocence phase of

his trial. Accordingly, these habeas corpus claims are denied.[21]

C. Ineffective Assistance at Sentencing

The Sixth Amendment also requires that defendants receive the assistance of counsel during sentencing. In order to prevail on a claim of ineffective assistance, "[a] defendant must demonstrate (1) that his representation at sentencing fell below an objective standard of reasonableness and (2) that a reasonable probability exists that, but for his attorney's unprofessional representation, the result of the proceeding would have been different." *Ebbole v. United States*, 8 F.3d 530, 533 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1229 (1994); see *Strickland*, 466 U.S. at 687-88. In the context of a death penalty hearing, the second prong is satisfied if there was a reasonable probability that at least one juror would be sufficiently influenced by mitigation evidence to vote against the imposition of the death penalty. *See Kubat v. Thieret*, 867 F.2d 351, 369 (7th Cir.), *cert. denied*, 493 U.S. 874

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[21] Petitioner's request for an evidentiary hearing is denied, since all relevant factual issues have been adequately developed either through the state court proceedings or Sammons's deposition in the instant case. *See United States ex ref. Simmons v. Gramley*, 915 F.2d 1128,1139 (7th Cir. 1990). Emerson claims that we must hold a hearing to determine whether Sammons actually had the theory respondent contends he did. We disagree. First, we need not concern ourselves with the [sic] Sammons's subjective state of mind in August 1979, since we have found his performance to be consistent with a rational theory of the case. Second, due to the lapse of time since the trial, and the attendant failure of memories, an evidentiary hearing would provide little assistance in resolving the issues raised by petitioner.

(1989). As with the application of Strickland to the guilt-innocence phase, we need not continue our analysis if petitioner fails to satisfy either prong. *Ebbole*, 8 F.3d at 533.

Emerson contends that Sammons failed to conduct any investigation or preparation into possible mitigation evidence, and failed to present any evidence at the sentencing phase, in contravention of his obligation to provide effective assistance of counsel. The Seventh Circuit has mandated that

> defense counsel must make a significant effort, based on reasonable investigation and logical argument, to ably present the defendant's fate to the jury and to focus the attention of the jury on any mitigating factors. Mitigating factors brought out at trial might be emphasized, a coherent plea of mercy might be given, or new evidence in mitigation might be presented. But counsel may not treat the sentencing phase as nothing more than a mere postscript to trial.

Kubat, 867 F.2d at 369. In support of his lack of investigation argument, petitioner points to the absence of any notes or other preparatory materials in the Public Defender case file. He also introduces affidavits from his family members stating that they were not contacted by Sammons about presenting possible mitigation evidence, as well as his own affidavit indicating that Sammons failed to discuss with him any possible sources of mitigation. In his deposition Sammons either fails to remember conducting any specific investigation[22] or admits that he prepared nothing before the conclusion of the guilt-

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[22] Sammons Dep. at 301-12.

innocence phase of the trial.[23] Respondent essentially concedes the issue of deficient representation with regard to Sammons's preparation, focusing instead on any prejudice his performance may have caused. After a thorough review of the trial court transcript and Sammons deposition, we conclude that Sammons's failure to conduct any meaningful investigation into potential mitigation evidence constituted deficient representation. While it is true that counsel had the benefit of a transcript of the first death penalty hearing, there was no evidence of mitigation presented in the first case so this testimony was of little value. Although Sammons claims that he reviewed Emerson's criminal record in order to ascertain what aggravating evidence would be introduced, this does not constitute sufficient preparation for a death penalty hearing. Because the scope of mitigation evidence which may be considered by the jury in sentencing is much broader than the range of relevant information which may be considered in determining guilt or innocence, *see* 720 ILCS 5/9-1 (c), (e) (no limitation on possible mitigating factors and rules of evidence do not apply), counsel is under a greater obligation to discover and evaluate potential evidence of mitigation. Moreover,

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[23] Q: Had you done any work with respect to developing a case of mitigation in the event Mr. Emerson was found guilty between the commencement of the trial, I've already asked you about that, and up until [the State rested]? Was there any ongoing work to prepare a case in mitigation?

A: No more than to—no more than perhaps discussing that with Mr. Brady or the other—the prosecutors, but no investigation, no work, no witnesses.

Sammons Dep. at 256 (emphasis added).

the death penalty phase "may be the stage of the proceedings where counsel can do his or her client the most good." *Kubat*, 867 F. 2d at 369. Therefore, prior to the sentencing phase, an attorney representing a capital defendant must undertake a reasonable investigation—constituting more than simply reviewing the transcript of a prior hearing and the criminal record of the defendant—into potential aggravating and mitigating evidence. *See Brewer v. Aiken*, 935 F.2d 850, 857 (7th Cir. 1991); *cf. Martinez-Macias v. Collins*, 810 F. Supp. 782, 817-18 (W.D. Tex. 1991) (decision to forgo interviewing family members, without knowledge of what they would say, was neither tactical nor reasonable), *aff'd*, 979 F.2d 1067 (5th Cir. 1992); *Gaines v. Thieret*, 665 F. Supp. 1342, 1362-71 (N.D. Ill. 1987) (eight hours preparation between guilt-innocence phase and sentencing phase insufficient), *aff'd in part rev'd in part on other grounds*, 846 F.2d 402 (7th Cir. 1988). Although we recognize the extreme time pressures placed upon public defenders, and the speed with which the instant case went to trial after Sammons was appointed, such concerns do not outweigh a capital defendant's right to have his attorney conduct the necessary preparation before sentencing. As the evidence shows that Sammons failed to perform such investigation, we find his performance deficient.

We next address Sammons's failure to present mitigation evidence to the jury during the aggravation-mitigation phase of sentencing. The State presented an opening statement wherein it characterized Emerson has a horrible and vicious individual who demonstrated no redeeming qualities whatsoever; Sammons did not make an opening statement. In presenting its case for imposition of the death penalty, the State introduced certified copies

of Emerson's seven prior felony convictions, all involving theft or armed robbery. Sammons objected to some of these documents, but his protestations were overruled. The State also presented additional evidence concerning petitioner's prior armed robberies, including testimony from one of the victims, two police officers who had arrested him, and a prosecutor who obtained a conviction against him. During this testimony, Sammons asked only one immaterial question in cross-examination. At the close of the state's case Sammons declined to introduce any mitigating evidence, and submitted the case to the jury without argument. It is clear from the record that at this point in the proceedings, the jury had no option other than to impose the death penalty. No evidence in mitigation had been presented during the sentencing phase, and none of the testimony from the guilt-innocence phase could have supplied mitigating information about Emerson.[24]

Respondent argues that Sammons's complete failure to present mitigating evidence was the result of Emerson's knowing decision to follow that route. The State points to numerous portions of the transcript wherein Emerson states that he does not want Sammons to act on his behalf. In particular, respondent quotes a colloquy between the trial judge and Emerson in which Emerson indicated that he did not want to present any evidence in mitigation. Trial Rec., Vol. III at 584-85. In general, a

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[24] Although petitioner's mother had been placed on the stand during the guilt-innocence phase, she was not asked any questions by Sammons. This damaged petitioner's case more than if Ms. Jackson had not been present at the trial, since "it could only appear to the jury that even his mother had nothing good to say about him." *Gaines*, 665 F. Supp. at 1366.

defendant cannot complain that his attorney was ineffective simply because the trial strategy chosen by the defendant led to an undesirable result. *See United State v. Kamel*, 965 F.2d 484, 497 (7th Cir. 1992). However, when counsel has failed to conduct a reasonable investigation into possibly mitigating evidence, he cannot possibly advise his client as to the propriety of a particular course of action. *See Blanco v. Singletary*, 943 F.2d 1477, 1501 (11th Cir. 1991) ("Counsel essentially acquiesced in [defendant's] defeatism without knowing what evidence [defendant] was foregoing. Counsel therefore could not have advised [defendant] fully as to the consequences of his choice not to put on any mitigation evidence."), *cert. denied*, 112 S. Ct. 2282 (1992). In this case, there is no indication that Sammons alerted Emerson to the fact that unless he presented some mitigating evidence, a death sentence was certain. Moreover, Sammons was incapable of adequately advising Emerson as to [the] value of potentially mitigating evidence, since he had conducted no investigation. Consequently, Emerson's decision to forego the presentation of evidence at the sentencing hearing cannot be viewed as simply a matter of trial strategy. Given that Emerson faced an almost certain sentence of death, counsel was remiss in not presenting some evidence of mitigation on his behalf, and his failure to do so constituted deficient performance.

In order to prevail on his petition, however, Emerson must also show that he was prejudiced by this failure to investigate and present mitigation evidence. In other words, Emerson must demonstrate a reasonable probability that the jury "would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Brewer*, 935 F.2d at 858 (quoting *Strick-*

land, 466 U.S. at 695). Petitioner maintains that had Sammons conducted an investigation, he could have uncovered at least seven potential witnesses who would have provided mitigating evidence.[25] He claims that one or more of these witnesses, as well as the social worker that he has retained as an expert witness, could have testified as to the following information. At age eight Emerson was shot when he was an innocent bystander to a grocery store robbery, and was prevented from finishing out the school year because of his injuries. After this incident Emerson claims that he began a period of extensive truancy, thereby inhibiting his educational development. Emerson was forced to live at several juvenile institutions over the next few years because of his truancy. He was evaluated as having an IQ of between 80-87, which his expert witness characterizes as between dull normal and borderline retarded. While at these institutions petitioner was repeatedly recommended for special services and counselling, but most often these services were not provided to him. Case workers dealing with Emerson concluded that he had no positive male role models in his life, had suffered from emotional neglect, and had not developed the skills necessary for him to live independently. Several of these witnesses could have testified that petitioner was a kind-hearted individual, who tried to take care of his family.

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[25] These witnesses were Emerson's mother (Ms. Jessie Jackson), his cousin (Pat Thompson), his brother (Ricky Jackson), a longtime friend (Louella Gunn), a former girlfriend (Olive Guye), and two prison ministry workers (Jane Minor and Sister Miriam Wilson). These last two witnesses knew Emerson prior to his second trial, and would be able to testify as to the positive attributes he demonstrated while incarcerated.

Emerson at one point in his life fathered a baby girl, whom he cared for in part until her death at age seven months. Petitioner claims that he was emotionally devastated by her death.

Respondent challenges the relevance and strength of much of this evidence. First, it argues that many of the witnesses were family members whose testimony would be of little value because of bias. While we agree that bias would exist, this does not mean that such testimony can never be relevant or useful in determining a defendant's sentence. *See Blanco*, 943 F.2d at 1505 (prejudice resulted from not presenting mitigating evidence from relatives). Second, the state contends that petitioner's history of truancy indicates not an inability to perform well at school, but a conscious desire to avoid it. However, this theory neglects to account for the contention that Emerson's troubles with school began when he was shot during a robbery, suggesting that his problem with school may be more complicated than simply rebelliousness. Third, respondent argues that petitioner's IQ is not relevant because it is not sufficiently low enough to characterize him as mentally retarded. While this classification of petitioner is correct, the Illinois death penalty statute does not require a defendant to be mentally retarded in order for him to present evidence of his IQ in mitigation. Rather, a jury could rationally consider evidence of the diminished mental capacity of a defendant who is not mentally retarded when determining the appropriate sentence. *Cf. Brewer*, 935 F.2d at 857-59. Finally, respondent maintains that allowing petitioner's expert witness to testify as to her evaluation of Emerson's experiences would also open the door to a detailed chronicle of petitioner's extensive criminal and behavioral prob-

lems. Notwithstanding the accuracy of this statement, we do not believe that it defeat's petitioner's claim. Considering that the evaluation outlined Emerson's problematic childhood and development in great detail, and provided a rational explanation as to how these problems facilitated his development into a criminal, a juror might well have given greater weight to these factors than to his criminal history.[26]

Taking all of this evidence together, we are left with the conviction that a reasonable probability exists that at least one juror would have found such mitigation evidence sufficient to preclude the imposition of the death penalty. Being a victim of violent attack at age eight, lacking emotional and educational support from his parents, losing a young child, and having a diminished IQ are all significant pieces of mitigation evidence which could have altered the jury's decision as to Emerson's culpability. *See Brewer*, 935 F.2d at 857-59 (habeas petitioner with diminished IQ, troubled childhood, deprived background and other psychiatric problems prejudiced by failure to present such evidence in mitigation). Testimony as to the care Emerson gave to his family and daugh-

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[26] Respondent cites *Resnover* in support of its contention that the report could only have harmed Emerson. However, the *Resnover* court's discussion of introducing criminal history though [sic] mitigation witnesses was directed only towards the deficiency prong of *Strickland*, not prejudice. *Resnover*, 965 F.2d at 1460. In that case, counsel made the rational decision to plead for his client's life rather than have his father testify in mitigation. Here, counsel did not make a rational decision to avoid the disclosure of petitioner's criminal history, but rather, failed to conduct any investigation into the utility of mitigation evidence and declined to make any sort of argument in mitigation.

ter could have humanized him before the jury and potentially persuaded at least one of them that Emerson was not the vicious killer portrayed by the State. *See Marinez-Macias*, 810 F. Supp. at 816-17 (prejudicial not to present evidence that habeas petitioner was good father and family man). Sammons's failure to present a closing argument compounded these errors, as the jury was left with the impression that no one—not even his lawyer—thought his life was worth saving. In sum, a reasonable probability exists that the information could have persuaded at least one juror not to impose the death penalty. Because none of this mitigating evidence was presented at the first hearing, our confidence in the fairness and reliability of the original sentencing has been seriously undermined. *See Lockhart*, 113 S. Ct. at 842. Accordingly, we grant petitioner's motion for habeas corpus and order that he be resentenced.

D. Constitutionality of Illinois Death Penalty Statute

Petitioner also argues that he was sentenced under an unconstitutional sentencing scheme. First, he contends that the unbridled discretion of prosecutors in seeking the death penalty leads to its "arbitrary, capricious, and freakish imposition." Second, he asserts that because the State need not declare its request to seek the death penalty until after the guilt-innocence phase of the trial, the scheme violates defendants' rights to due process of law. Third, petitioner contends that this lack of pretrial notice also hampers the preparation of a meaningful strategy by a lawyer, thereby violating the right to effective assistance of counsel. In addition to the fact that at least some of these arguments may have been waived in

the state courts, all three of them have been repeatedly rejected by the Seventh Circuit. *See. e.g.*, *Williams v. Chrans*, 945 F.2d 926, 938-39 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 3002 (1992); *Silagy v. Peters*, 905 F. 986, 990-97 (7th Cir. 1990), *cert. denied*, 498 U.S. 1110 (1991). Moreover, the Supreme Court has upheld similar death penalty statutes in the past. *See, e.g.*, *Gregg v. Georgia*, 428 U.S. 153, 199 (1976). In the interest of limiting the length of this opus, we deny Emerson's claims for the reasons stated in those opinions.

III. Conclusion

For the reasons set forth above, Emerson's petition for habeas corpus is granted with regard to his sentence of death and denied in all other respects. The state is ordered to resentence petitioner pursuant to the dictates of the Sixth Amendment within 120 days of the date of this order. It is so ordered.

Marvin E. Aspen
United States District Judge

Dated March 30, 1995

DENNIS EMERSON, Petitioner-Appellant, Cross-Appellee v. RICHARD B. GRAMLEY, Warden, Pontiac Correctional Center, Respondent-Appellee, Cross Appellant

Nos. 95-2988 & 95-3018

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

1996 U.S. App. LEXIS 24806

September 19, 1996

PRIOR HISTORY: Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. No. 93 C 4650. Marvin E. Aspen, Chief Judge.

Original Opinion of July 30, 1996, Reported at: 1996 U.S. App. LEXIS 18751.

COUNSEL: For DENNIS EMERSON, Petitioner-Appellee: Prentice H. Marshall, Jr., Linton Jeffries Childs, Jay Tyson Covey, SIDLEY & AUSTIN, Chicago, IL.

For RICHARD B. GRAMLEY, Warden, Pontiac Correctional Center, Respondent-Appellant: Rita M. Novak, OFFICE OF THE ATTORNEY GENERAL, Chicago, IL.

JUDGES: Before Hon. RICHARD A. POSNER, *Chief Circuit Judge*, Hon. WILLIAM J. BAUER, *Circuit Judge*, Hon. KENNETH F. RIPPLE, *Circuit Judge*

OPINION: ORDER:

On August 13, 1996, petitioner-appellant, cross-appellee Dennis Emerson filed a petition for rehearing with suggestion for rehearing en banc. A majority of the judges* on the original panel has voted to deny the petition, and none of the active judges** has requested a vote on the suggestion for rehearing en banc. The petition is therefore DENIED.

* Hon. Kenneth F. Ripple voted to grant the petition.

** Hon. Walter J. Cummings did not participate in the vote for rehearing en banc.

(2)

No. 96-1043

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

JERRY GILMORE, WARDEN,
PONTIAC CORRECTIONAL CENTER, *Petitioner*,

v.

DENNIS EMERSON, *Respondent.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

1. Whether the State waived application of amended 28 U.S.C. § 2254(d) by not raising its applicability in a timely manner.

2. Whether the court of appeals misapplied Strickland v. Washington when it concluded that Dennis Emerson was denied effective assistance of counsel at the sentencing phase of his capital murder trial.

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No. 96-1043

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

JERRY GILMORE, WARDEN,
PONTIAC CORRECTIONAL CENTER, *Petitioner*,

v.

DENNIS EMERSON, *Respondent.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Dennis Emerson respectfully submits this brief in opposition to the petition for a writ of certiorari filed by Jerry Gilmore, Warden of Pontiac Correctional Center.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254(a) provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

After the district court entered final judgment and the parties' cross-appeals were orally argued in the court of appeals, 28 USC § 2254(d) was amended by the Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. No. 104-132, 110 Stat. 121) ("Act") to provide:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

COUNTERSTATEMENT OF THE CASE

The statement of the case in the State's petition omits numerous facts necessary for consideration of the second question presented, in violation of Rule 14.1(g). The additional facts set forth below are material to consideration of the second question presented. The State's statement of the case also affirmatively misrepresents facts pertaining to the submission in the

state post-conviction proceeding of an affidavit by Dennis Emerson's trial counsel, as explained below.

1. At Dennis Emerson's state court capital sentencing hearing, Emerson's trial counsel, Cook County Assistant Public Defender James Sammons, presented no mitigating evidence, made no attack on the State's aggravating evidence, and presented no opening statement or closing argument on his client's behalf -- not even a plea for mercy. In the federal habeas corpus proceeding, Sammons admitted under oath that he did not conduct any investigation into the mitigating evidence that could have been introduced on Emerson's behalf, did not conduct any interviews of potential witnesses, did not prepare any opening statement or closing argument for the sentencing phase, and did not develop any theory or strategy for the sentencing phase of Emerson's trial. None of Sammons' failures to investigate or prepare were considered by the state post-conviction court because the state court refused to permit Emerson's post-conviction counsel to take Sammons' deposition.

2. If Sammons had conducted an investigation of the available mitigating evidence, he would have learned that Emerson came from a severely impoverished and troubled family background; that Emerson was a gunshot victim at the age of eight; that resulting medical problems caused Emerson to miss a year of school, stunting Emerson's educational and personal development; that Emerson was thereafter evaluated as being borderline retarded, with an I.Q. of 80; that Emerson was emotionally devastated by the death of his infant daughter, possibly strangled by her mother; and that Emerson, while incarcerated, was a model prisoner and

demonstrated rehabilitative potential. At least seven witnesses were available to present this mitigating evidence. The State has never challenged the truthfulness of this evidence, or denied that Sammons could have uncovered it had he bothered to conduct even a minimal investigation.

3. In affirming the district court's decision that Sammons' failure to investigate or present this mitigating evidence deprived Emerson of a fair sentencing hearing, Chief Judge Posner wrote for a unanimous court that at least "one juror in twelve" might find Emerson's life "so bleak, so deprived, so harrowing, so full of horrors ... as to reduce Emerson's moral responsibility ... to a level at which capital punishment would strike that juror as excessive or one or more jurors would think Emerson deserving of mercy." Emerson v. Gramley, 91 F.3d 898, 907 (7th Cir. 1996). In support of this conclusion, the court cited other recent Illinois cases in which the State sought the death penalty, but the finder of fact declined to impose it after hearing mitigation evidence similar to that available to, but neither investigated nor presented by, Emerson's trial counsel. Id. (citing People v. Starnes, 273 Ill. App. 3d 476, 480, 652 N.E.2d 1177, 1181 (1995), and People v. Morrow, 269 Ill. App. 3d 1045, 1047, 647 N.E.2d 1100, 1103, 1107 (1995)).

4. In support of its argument that Sammons' conduct was consistent with Emerson's "instructions," the State quotes a short colloquy from the transcript in which Sammons represented to the court that Emerson did not want him to present evidence or argument, followed by Emerson's statement that he had no evidence that he wanted to present himself. This excerpt from the transcript, however, must be read in the context of the entire record.

The day before the sentencing hearing, Sammons had conceded Emerson's guilt to the charge of capital murder in his closing argument.[1] Sammons had previously waived opening statement, had made no effort to attack the credibility of Emerson's sole accuser, and had presented no evidence of Emerson's alibi. Emerson was understandably disgusted with his lawyer's abysmal performance and stated on the record that he did not want Sammons filing "motions on my behalf."

When the sentencing hearing began, Sammons had done no investigation of mitigating evidence and had done nothing to prepare for the hearing. The State does not argue that this failure was consistent with Emerson's "instructions." Because Sammons "had failed to conduct any investigation, however brief, into the possible existence of mitigating circumstances ... Sammons could not advise Emerson whether to try to present evidence of such circumstances." 91 F.3d at 906 (emphasis in original). "Nor did either Sammons or the trial judge warn Emerson of the fell consequences of failing to establish some mitigating circumstances, without which ... a sentence of death was certain unless the jury disobeyed the judge's instructions." Id. Indeed, "[t]here were no warnings" of the consequences of not presenting mitigating evidence. No one told Emerson that "without an effort to persuade the jury to exercise lenity he was doomed." Id. Without legal advice, Emerson himself did not know "what an investigation of his personal history would bring out that might help him with the jury." Id.

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[1] Circuit Judge Ripple dissented from the majority's decision to uphold the district court's refusal to grant habeas relief with respect to Emerson's convictions. Emerson's pending certiorari petition (No. 96-7254) concerns the legal consequences of Sammons' unauthorized concession of Emerson's guilt in light of available evidence to support an acquittal.

This is the context in which the colloquy relied on by the State took place. The Seventh Circuit unanimously concluded that under these "unique circumstances," it could not be said "that Emerson would have refused to permit argument or evidence no matter what Sammons and the trial judge had said and done." Id. at 906-07. Accordingly, the Seventh Circuit rejected the State's argument that Sammons' conduct was consistent with Emerson's instructions and held that "Emerson's waiver of his procedural rights at the sentencing hearing cannot be considered a knowing waiver to which he should be held." Id.[2]

REASONS FOR DENYING THE WRIT

I. THIS COURT SHOULD NOT GRANT CERTIORARI TO DECIDE WHETHER THE STATE WAIVED APPLICATION OF AMENDED SECTION 2254(D) IN THE COURT OF APPEALS.

After the district court had entered final judgment granting Emerson relief from his death sentence (but not from his convictions), and after the parties' cross-appeals had been briefed, orally argued, and submitted for decision, Congress passed and the President signed the Act which, among other things, amended Section 2254(d). In the course of affirming the district court's judgment, the court of appeals remarked that the State had not, after the Act had become law, asserted that the Act had any application to the case. The court of appeals further remarked

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[2] In addition to the colloquy from the sentencing hearing, the State relies on an affidavit from Sammons filed during state post-conviction proceedings (not in the Illinois Supreme Court on direct appeal, as the State falsely claims). The affidavit does not cite the transcript, but states only in conclusory terms that Sammons believed that Emerson did not want Sammons to present mitigating evidence to the jury. Notably, Sammons' affidavit does not challenge any of the specific circumstances discussed above. The affidavit also asserts that Sammons had considered a "strategy" of stipulating that the evidence in aggravation and mitigation would be the same as at Emerson's first trial -- a remarkable strategy, given that no mitigating evidence was presented at the first trial and given that Emerson was sentenced to death in that proceeding.

that because the Act's changes to Section 2254(d) were not jurisdictional in nature, arguments based on the Act could be -- and had been -- waived. The State never sought rehearing or suggested rehearing en banc on this issue, even though such a petition would have been highly appropriate, given that the court of appeals had addressed this issue sua sponte.

In its first question presented, the State asks this Court to hold that it did not waive application of amended 28 U.S.C. § 2254(d), because application of that provision cannot be waived. The State contends that the amendment, which prohibits district courts from granting habeas relief unless certain prerequisites are met, actually eliminated district courts' subject matter jurisdiction over cases where those prerequisites for relief are not satisfied. The State further asks this Court to hold that the Seventh Circuit was required to apply the amendment retroactively to divest the district court of subject matter jurisdiction in this case, even though the amendment was not enacted until more than a year after the district court entered final judgment. This Court should not grant certiorari to review the court of appeals' passing remarks on this issue -- an issue that was neither briefed nor argued below.

1. *There is no conflict among lower court decisions with respect to the question presented.* The courts that thus far have considered the issue have unanimously held that application of the amendment to 28 U.S.C. § 2254(d) at issue here can be waived, because it does not affect the district courts' subject matter jurisdiction, but rather modifies the substantive legal standard that applies to habeas claims properly within the district courts' jurisdiction. Emerson, 91 F.3d at 900; Lindh v. Murphy, 96 F.3d 856, 865 (7th Cir. 1996) (en banc), cert. granted, 65 U.S.L.W. 3487 (January 14, 1997); Rehbein v. Clark, 94 F.3d 478, 481 n.4 (8th Cir. 1996); Davis v. Executive Director of Dep't of Corrections, 100 F.3d 750, 755 n.1 (10th Cir. 1996). Unless

and until some lower court reaches the opposite conclusion, there is simply no need for this Court to intervene in this case. See McCray v. New York, 461 U.S. 961, 961 (1983) (Stevens, J.). Even if the issue is thought to warrant review, it should be considered in a case where the issue has been throughly addressed in the lower courts.

2. *The decision below was manifestly correct.* The plain language of the 1996 amendment, this Court's decisions interpreting other amendments to Section 2254, and the legislative history surrounding adoption of the Act all confirm that the Seventh Circuit was correct when it observed that the 1996 amendment "affects the scope of federal judicial review of state court determinations rather than the power of review," and, as such, is an argument the State can waive by not raising it in a timely manner. 91 F.3d at 900 (emphasis added).[3]

The amendment to Section 2254(d) relied on by the State provides that "[a]n application for a writ of habeas corpus ... shall not be granted ... unless" one of two requirements is satisfied. (Emphasis added). Thus, the plain language of the amendment establishes a prerequisite for granting an application for a writ of habeas corpus, not a prerequisite for considering the merits of such an application.

This Court has long drawn a careful distinction between provisions of the habeas statute that are jurisdictional and provisions that delineate the scope of federal review. The jurisdictional requirements are set forth in Section 2254(a), which was not amended in 1996. Section 2254(a) provides that "a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the

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[3] The State of Illinois now routinely asserts in federal habeas litigation that federal courts are obligated to apply the amendments to Section 2254(d), therefore eliminating any waiver issue in future cases.

ground that he is in custody in violation of the Constitution or laws or treaties of the United States." See also 28 U.S.C. § 2241 (setting forth same jurisdictional prerequisites). In Brown v. Allen, 344 U.S. 443, 460-61 (1953), this Court explained that a court "entertains" a habeas petition if it considers the petition on the merits, even if it subsequently determines that a hearing is unnecessary. See also Hartford Fire Ins. Co. v. California, 509 U.S. 764, 813 (1993) (Scalia, J., dissenting) (recognizing distinction between subject matter jurisdiction to adjudicate a claim and substantive limitations of statute). Thus, "[b]y statute, a federal habeas court has jurisdiction over any claim that a prisoner is 'in custody in violation of the Constitution or laws' of the United States." Withrow v. Williams, 507 U.S. 680, 716 (1993) (Scalia, J., concurring in part and dissenting in part). See also J. Liebman & R. Hertz, Federal Habeas Corpus Practice and Procedure § 8.1 (2d ed. 1994), at 191. In interpreting another 1996 amendment, this Court reemphasized this longstanding distinction between federal courts' subject matter jurisdiction to "entertain" petitions for habeas corpus and the standards that govern whether such petitions should be granted. Felker v. Turpin, 116 S. Ct. 2333, 2337 (1996).

Once the prerequisites for subject matter jurisdiction are established, the district court then considers other statutory and judicially recognized limitations on habeas corpus relief. See 28 U.S.C. § 2243 (a judge "entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto"). These requirements affect the scope of federal review, but are not jurisdictional and can be waived by the State if they are not asserted in a timely manner. These requirements include the bar against retroactive application of new rules, the exhaustion

requirement, and the procedural default rule. See Schiro v. Farley, 510 U.S. 222, 228 (1994) (bar to retroactive application of new rules is not jurisdictional and can be waived); Estelle v. Smith, 451 U.S. 454, 468 n.12 (1981) (procedural default defense can be waived); Granberry v. Greer, 481 U.S. 129, 136 (1987) (exhaustion defense is not jurisdictional and can be waived); see also McCleskey v. Zant, 499 U.S. 467, 482 (1991) (State bears burden of pleading abuse of writ).

The distinction between jurisdictional requirements and substantive requirements for relief was carefully maintained in the 1996 amendments. Certain of the 1996 amendments delineate circumstances under which a judge is not "required to entertain" a petition or under which petitions "need not be entertained." 28 U.S.C. § 2244(a), (b). Other 1996 amendments -- including the amendment to Section 2254(d) at issue here -- simply delineate circumstances under which a court should not "grant" relief when adjudicating a petition within its jurisdiction. See 28 U.S.C. § 2254(d).

In the instant case, the State invites the Court to ignore this longstanding distinction between jurisdictional requirements and substantive limitations on the right to relief. This Court should reject the State's invitation. As this Court recognized in Felker, the implication of restrictions on federal courts' jurisdiction is not favored. 116 S. Ct. at 2338-39. Congress must expressly impose any such jurisdictional restrictions, and the 1996 amendment to Section 2254(d) does not do so.

The legislative history also supports the conclusion that the 1996 amendment to 28 U.S.C. § 2254(d) was not intended to be jurisdictional. Senator Kyl introduced another amendment to the same bill providing that "an application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment or order of a State court shall not be entertained by a

court of the United States unless the remedies in the courts of the State are inadequate or ineffective to test the legality of the person's detention." 141 Cong. Rec. S. 7803-1, S. 7829. The Senate rejected that amendment and instead approved the language ultimately codified in amended Section 2254(d), restricting the scope of federal review of the merits of federal claims, but placing no restrictions on federal judges' jurisdiction to "entertain" such claims. See id. at S. 7849.

3. *The decision below does not conflict with any of this Court's decisions.*

The State contends that the decision below conflicts with language in footnote 2 of this Court's decision in Sumner v. Mata, 449 U.S. 539 (1981), and with this Court's decision in Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908). In Sumner, this Court considered the effect of state court factual findings despite the State's failure to make any argument based on the effect of such findings in the court of appeals. In Mottley, this Court held that appellate courts have a duty to make sure that lower courts do not exceed their jurisdiction. The Seventh Circuit's statement in Emerson is not inconsistent with either of these precedents.

The district court in Sumner had denied habeas relief. Without considering the substantive limitations imposed by Section 2254, the court of appeals reversed and directed the district court to grant relief. A careful reading of Sumner makes clear that this Court was principally concerned with the Ninth Circuit's failure to "apply" the controlling substantive law as "mandated by the statute." 449 U.S. at 547. Although the Court referred in footnote 2 to the district court's "jurisdiction," id. at 547 n.2, it also referred to "certain limitations on [federal courts'] authority specifically set forth in 28 U.S.C. § 2254(d)," id. at 544, to "the limited nature of the review provided federal courts by 28 U.S.C. § 2254," id. at 541, to "the limited nature of

the review provided by § 2254," id. at 550 n. 3, and to "the role to be played by the federal courts in the exercise of the habeas corpus jurisdiction conferred ... by 28 U.S.C. § 2254." Id. at 543. The specific statutory provision at issue in Sumner, now amended and renumbered as 28 U.S.C. § 2254(e), created a rebuttable presumption of correctness for state court factual findings -- a presumption that can be overcome in eight different ways. This Court chastised the court of appeals for ignoring the statute's substantive provisions governing federal habeas review and therefore remanded for further consideration of the merits of the case. The Court said nothing about dismissing for want of subject matter jurisdiction, which is the "only function remaining to the court" if subject matter jurisdiction is lacking. Ex Parte McCardle, 74 U.S. (7 Wall.) 506, 514 (1869).

Moreover, whatever Sumner says about the nature of the 1966 amendments to Section 2254, it says nothing about the 1996 amendment at issue here. Sumner does not in any way question the longstanding distinction between jurisdictional prerequisites for considering habeas petitions and substantive limitations on federal habeas courts' authority to grant relief. Nor does Sumner hold that all provisions of Section 2254 are jurisdictional and hence not waivable. Indeed, this Court's more recent subsequent decisions clearly establish that many substantive limitations on habeas relief are not jurisdictional and can be waived. See, e.g., Granberry, 481 U.S. at 136.

For the reasons explained above, the Act's amendment to Section 2254(d) cannot plausibly be read as affecting district courts' subject matter jurisdiction, let alone as divesting district courts of subject matter jurisdiction after the entry of final judgment in the district court. The district court issued the writ with respect to Emerson's sentence and entered final judgment

more than a year before the Act became law. Thus, the Seventh Circuit's comment that amended Section 2254(d) "affects the scope of federal judicial review of state court determinations rather than the power of review" is not inconsistent with this Court's decisions.

4. *Certiorari should be denied because application of amended Section 2254(d) would not affect the result in this case.* Even if one assumes, arguendo, that the Seventh Circuit's comment with respect to whether Section 2254(d) is jurisdictional was incorrect, certiorari should nevertheless be denied, because application of the amended version of Section 2254(d) to the facts of this case would not affect the result. Pursuant to amended Section 2254(d), a federal court may not issue a writ of habeas corpus "with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Even if amended Section 2254(d) applied to Emerson's petition, it would not affect the result in this case because (1) the Illinois state courts never considered the merits of the claim on which Emerson was ultimately granted relief, (2) even if the Illinois Supreme Court's decision on direct appeal is regarded as a decision on the merits of Emerson's claim of ineffective assistance of counsel at sentencing, that decision was contrary to this Court's precedents or involved an unreasonable application of those precedents, and (3) to the extent that the Illinois Supreme Court's decision on direct appeal is regarded as containing any determinations of fact, such determinations were unreasonable.

On direct appeal, Emerson contended that Sammons' failure to present mitigating evidence constituted ineffective assistance of counsel. The Illinois Supreme Court rejected that argument, holding that "failure to present any evidence in mitigation does not automatically constitute ineffective assistance of counsel," and noting that the record before the court did not reveal what mitigating evidence, if any, was available. People v. Emerson, 122 Ill. 2d 411, 439, 522 N.E.2d 1109, 1120 (1987) (emphasis added). Under Illinois law, Emerson was not permitted to place the available mitigating evidence before the court on direct appeal, because that evidence was not part of the trial record. See, e.g., People v. Morris, 229 Ill. App. 3d 144, 166, 593 N.E.2d 932, 947, appeal denied, 146 Ill. 2d 644, 602 N.E.2d 468 (1992) (refusing to consider ineffective assistance of counsel claim based on trial counsel's failure to investigate possible alibi witnesses); People v. Reimolds, 92 Ill. 2d 101, 106-07, 440 N.E.2d 872, 875 (1982) (scope of direct appellate review is limited to matters appearing from the face of the trial record). Nor did Emerson have the opportunity to develop or supplement the record with facts concerning his Sammons' failure to investigate available mitigating evidence, failure to prepare for the capital sentencing hearing, and failure to advise Emerson as to the consequences of not presenting mitigating evidence.

Accordingly, the Illinois Supreme Court could not and did not consider on direct appeal any claim of ineffective assistance of counsel at sentencing based on Sammons' failure to investigate or present specific mitigating evidence, failure to prepare for the sentencing hearing, or failure to advise Emerson about the consequences of not presenting such evidence. This claim was presented at every stage of Emerson's state post-conviction proceedings, but the state courts refused to consider the claim on the merits. Therefore, the claim on which Emerson prevailed in

the federal district court and the court of appeals -- a claim of ineffective assistance of counsel at sentencing based on Sammons' failure to investigate and present specific, available mitigating evidence and failure to advise Emerson as to the consequences of not presenting such evidence -- was never "adjudicated on the merits in State court proceedings," and amended Section 2254(d) therefore has no application to Emerson's claim.

Even if the Illinois Supreme Court's decision on direct appeal is regarded as an adjudication on the merits of Emerson's claim of ineffective assistance of counsel at sentencing, that decision was contrary to or based on an unreasonable interpretation of established federal law as established by this Court. Remarkably, the Illinois Supreme Court's decision on direct appeal neither discusses nor cites this Court's seminal decisions concerning ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668 (1984), and United States v. Cronic, 466 U.S. 648 (1984). The Illinois Supreme Court completely ignored this Court's recognition in Strickland that trial counsel's effectiveness should be assessed based on "all the circumstances." See Strickland, 466 U.S. at 691. Instead, it purported to consider Sammons' effectiveness based solely on circumstances apparent from the trial transcript or the record on direct appeal. The Illinois Supreme Court also ignored this Court's determination that an attorney's strategic decision made after less than complete investigation are entitled to deference only "to the extent that reasonable professional judgment supports the limitations on the investigation." Id. Furthermore, the Illinois Supreme Court purported to construe isolated comments by Emerson as a waiver of Emerson's right to present mitigating evidence, without determining that Emerson's waiver was intelligent, voluntary, and knowing, as required by numerous decisions of this Court. See Johnson v. Zerbst, 304 U.S. 458, 465 (1938); Gardner v. Florida, 430 U.S. 349, 361 (1977); Schneckloth

v. Bustamonte, 412 U.S. 218, 237-38 (1973); Brady v. United States, 397 U.S. 742, 748 (1970); Brookhart v. Janis, 384 U.S. 1, 7 (1966); Von Moltke v. Gillies, 332 U.S. 708, 729 (1948); Glasser v. United States, 315 U.S. 60, 71 (1942).

Under these circumstances, the Illinois Supreme Court's rejection of Emerson's claim of ineffective assistance of counsel at sentencing -- even if it is regarded as an adjudication of the claim on which Emerson subsequently obtained relief in federal court -- was clearly contrary to this Court's precedents or based on an unreasonable interpretation of those precedents. Indeed, the Seventh Circuit's unanimous conclusion that Emerson was deprived of the effective assistance of counsel at sentencing was based squarely on Strickland, not on subsequent decisions of the Seventh Circuit or other inferior federal courts. Accordingly, Emerson would have been entitled to relief even if amended Section 2254(d) applied.

Finally, to the extent the Illinois Supreme Court adjudicated Emerson's claim of ineffective assistance of counsel at sentencing, and to the extent that court's decision is regarded as containing any determinations of fact, such determinations were plainly unreasonable. The only conceivable factual determination on this issue was the Illinois Supreme Court's observation on direct appeal that "counsel's conduct at the sentencing hearing was consistent with the defendant's stated wishes." Emerson, 122 Ill. 2d at 439-40, 522 N.E.2d at 1121. As the Seventh Circuit explained in its decision below, this conclusion was patently unreasonable, in light of all the circumstances, including Sammons' concession of guilt in closing argument the day before sentencing, Emerson's resulting loss of confidence in Sammons, Sammons' failure "to conduct any investigation, however brief, into the possible existence of mitigating circumstances," Sammons' failure to "advise Emerson whether to try to present evidence of such circumstances," the failure

of both Sammons and the trial judge to "warn Emerson of the fell consequences of failing to establish some mitigating circumstances," and Emerson's ignorance of "what an investigation of his personal history would bring out that might help him with the jury." Emerson, 91 F.3d at 906-07. As the Seventh Circuit concluded, in light of all of these circumstances, it is simply not reasonable -- or even "possible" -- to say "that Emerson would have refused to permit argument or evidence no matter what [trial counsel] or the trial judge had said and done." Id. at 906. Any purported factual determination to the contrary was wholly unreasonable. For this reason as well, Emerson would be entitled to relief even under the new standard set forth in amended Section 2254(d), and granting certiorari to decide whether that standard should have been applied to Emerson's case would therefore not affect the outcome of this case.

II. THIS COURT SHOULD NOT GRANT CERTIORARI TO REVIEW A CLAIM THAT THE COURT OF APPEALS MISAPPLIED STRICKLAND V. WASHINGTON.

The State's second question in reality presents nothing more than a contention that the Seventh Circuit misapplied a properly stated rule of law to the facts of this case. Contrary to the State's assertions (Pet., pp. 11, 14), the Seventh Circuit did not hold that Sammons was *per se* ineffective for failing to present mitigation evidence at the capital sentencing hearing. Instead, the Seventh Circuit expressly recognized that in certain circumstances, it may be a sound defense strategy not to offer evidence of mitigating circumstances. Emerson, 91 F.3d at 906 (citing Darden v. Wainwright, 477 U.S. 168, 186 (1986)). In this case, however, Sammons' admitted failure to investigate any of the extensive available mitigating evidence rendered him totally incapable of discharging his professional obligation to advise Emerson as to the propriety of not

presenting such evidence and thereby "brought his representation of Emerson well below the minimum level of representation." Id. (citing Burger v. Kemp, 483 U.S. 776, 790-95 (1987)).

As it did below, the State insists that Sammons' failure to present mitigating evidence was appropriate in light of Emerson's "express desires" not to introduce such evidence. (Pet., p. 15). As explained in more detail, at pages 4-6, supra, the Seventh Circuit expressly considered Emerson's statements and concluded that Emerson's purported "waiver" of his constitutional right to put on mitigating evidence "cannot be considered a knowing waiver to which he should be held." Emerson, 91 F.3d at 906. This Court has expressly recognized the need for waivers of fundamental constitutional rights to be "intelligently, voluntarily, and knowingly" made. Johnson, 304 U.S. at 465.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the State's petition for a writ of certiorari be denied.

Respectfully submitted,

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February 3, 1997

William K. Suter
Clerk of Court
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

Re: Gilmore v. Emerson (No. 96-1043)

Dear Mr. Suter:

Enclosed for filing are an original and eleven copies of respondent Dennis Emerson's Brief in Opposition to the Petition for a Writ of Certiorari filed by Jerry Gilmore; Proof of Service of the brief; an original and eleven copies of a Motion for Leave to Proceed In Forma Pauperis; and Proof of Service of the Motion.

Please file stamp and return the extra copy of the Brief in Opposition and the Motion for Leave to Proceed In Forma Pauperis in the envelope provided. Thank you.

Sincerely,

Linton J. Childs

Linton J. Childs

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SUPREME COURT, U.S.

Enclosures
cc: All Counsel of Record

No. 96-1043

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

JERRY GILMORE, WARDEN,
PONTIAC CORRECTIONAL CENTER, *Petitioner*,

v.

DENNIS EMERSON, *Respondent.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit.

PROOF OF SERVICE

I, Jeffrey B. Charkow hereby certify that on this 3rd day of February, 1997, three pies of Dennis Emerson's Brief in Opposition to Petition for a Writ of Certiorari in this case re mailed, first class postage prepaid, to James E. Ryan, Attorney General of the State of nois, 100 West Randolph Street, 12th Floor, Chicago, Illinois 60601, Phone: (312) 814-3000; leen C. Anderson, Assistant Attorney General, 100 West Randolph Street, 12th Floor, icago, Illinois 60601, (312) 814-2232; and to Richard A. Devine, Cook County State's torney, 309 Richard J. Daley Center, Chicago, Illinois 60602, Phone (312) 443-5440, counsel r the Petitioner herein. I further certify that all parties required to be served have been served.

BEST AVAILABLE COPY